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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

Nos. 453 to 475.

JOHN M. SLOAN, ET AL., Appellants,

vs.

THE UNITED STATES, ET AL.

Appeals from the Circuit Court of the United States for the District of Nebraska.

BRIEF FOR DEFENDANTS.

The actions involved in this hearing and set out in the record are by mixed blood claimants for allotment of lands on the Omaha Indian Reservation. The suits were brought under the provisions of an act approved February 6, 1901, (31 U. S. Stat., 760) and the allotments are claimed under the provisions of section 5, of an act of August 7, 1882. (22 U. S. Stat., 341).

The objections to the allotments claimed may be summarized as follows:

(a) That the claimants are not members of the Omaha tribe of Indians, and that the act of 1882 did not contemplate allotments to persons not members of the tribe.

(b) That the claimants are descendants of free

born full blood white fathers and take the status of their fathers as white persons, and are not Indians within the meaning of the law.

(c) That the claimants as such descendants of white fathers were not born or reared on the Indian reservation, and have not been adopted into the tribe and are not recognized by the tribe as members thereof.

(d) That the claimants in some instances, and in others their immediate ancestors received allotment of lands on Nehama Reservation under the provisions of Article x of Treaty of 1830 (7 U. S. Stat., 328) and which operated to cut off any further claims on their part to share in the lands of the Omaha Indian tribe.

(e) That the claimants had presented their claims to, and invoked the jurisdiction of the Interior Department, to allot them lands, and their right to allotment had been adjudicated against them prior to the bringing of these suits, and which adjudications are a bar to these actions.

(f) That in any event the claimants have no such vested rights in the particular lands claimed as will justify a court of equity in granting the relief prayed.

A Brief History of the Complainants and Statement of the Case.

As far back as the year 1830, the Omaha tribe of Indians in conjunction with other Indian tribes, foreseeing the conflicts and unfriendly controversies that were liable to arise between the Indians and their mixed blood relatives when the means of supplying livelihood by hunting should fail, and the reservations became limited in area and ultimately to be alloted to the members of the tribe, desired to make some pro-

vision for their mixed blood relatives, and to entirely separate them from the Indian tribe. To that end a treaty was entered into in the year 1830 (7 U. S. Stat. at Large, p. 328) between commissioners on behalf of the United States on the one part and the Confederated Tribes of the Sacs and Foxes; the Medawah-Kanton, Wahpacoota, Wahpeton and Sisseton bands or tribes of Sioux; the Omahas, Iowas, Otoes and Missourias on the other part. A reason for the making of said treaty is set out in the introductory clause thereof, to-wit:

> "The said tribes being anxious to remove all causes which may hereafter create any unfriendly feeling between them, and being also anxious to provide other sources for supplying their wants besides those of hunting, which they are sensible must soon entirely fail them; agree with the United States on the following articles."

By article 10 of said treaty of 1830, there was set apart for the half-breeds of the Omahas and certain other Indian tribes, a reservation commonly known as the Nemaha reservation. This reservation for the half-breeds was set aside at the request of the Omaha tribe of Indians and other tribes acting conjointly with said tribe for the purpose above indicated, and which article reads as follows:

> ARTICLE X. "The Omahas, Ioways and Ottoes, for themselves, and in behalf of the Yanckton and the Santie bands of Sioux, having earnestly requested that they might be permitted to make some provisions for their half-breeds, and particularly that they might bestow upon them the tract of country within

the following limits, to-wit: Beginning at the mouth of the Little Ne-mohaw river, and running up the main channel of said river to a point which will be ten miles from its mouth in a direct line; from thence in a direct line, to strike the Grand Ne-mohaw ten miles above its mouth, in a direct line (the distance between the two Ne-mohaws being about twenty miles); thence down said river to its mouth; thence up, and with the meanders of the Missouri River to the point of beginning; it is agreed that the half-breeds of said tribes and bands may be suffered to occupy said tract of land; holding it in the same manner, and by the same title that other Indian titles are held; but the President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding article."

The intention of the tribes to remove their half-breeds or mixed bloods from the body of the tribe and to make a complete separation further appears from the fact that the treaty was signed at Prairie du Chien, in the territory of Michigan, and the land selected for the half-breed reservation was situate in the southeast corner of what subsequently became the state of Nebraska, and, further, from the fact that the half-breeds were to occupy the said Nemaha reservation and have the same title thereto that other Indian tribes have to their reservation; that is to say, that the Nemaha reservation was to be the reservation for the half-breeds,

and the Omaha tribe of Indians (after the half-breeds should have been separated therefrom) should own the Omaha Indian reservation.

An additional consideration passed from the Omaha tribe of Indians for the benefit of the half-breeds in this, to-wit: that the land selected for the Nemaha reservation formerly belonged to the Otoe tribe of Indians, and it became necessary to compensate the Otoe tribe of Indians therefor. The result was that the Omaha tribe of Indians, with other tribes co-operating with them, paid out of their annuities to the Otoes, the sum of $300.00 per year for the period of ten years, as provided in Article XI of said treaty.

> "ARTICLE XI. The reservation of land mentioned in preceding article having belonged to the Otoes, and having been exclusively ceded by them, it is agreed that the Omahas, the Ioways and the Yancton and Santie bands of Sioux shall pay out of their annuities to the said Otoe tribe, for the period of ten years, three hundred dollars annually; of which sum the Omahas shall pay one hundred dollars, the Ioways one hundred dollars, and the Yancton and Santie bands one hundred dollars."

As a result of said treaty the ancestors of the present complainants moved onto the said Nemaha reservation, and accepted of the benefits of said treaty. By Section 5 of the Act of Congress of July 31, 1854 (10 U. S. Statutes, 332), the President of the United States was directed to cause said reservation to be surveyed and allotted to the persons entitled to the same, in fee simple, and in such manner and under such rules and regulations as he may prescribe:

"And to defray the expenses of the same

there be, and is hereby, appropriated the sum of ten thousand nine hundred and twenty-two dollars and twenty-nine cents."

Subsequently the ancestors of the complainants on either the maternal or the paternal side, and in some instances the present complainants in person, received allotment of lands, in fee simple, upon the said Nemaha reservation, and which they were only entitled to receive on the theory that they had separated themselves from the tribe, and that the tribal lands of the Omaha tribe of Indians should remain for the sole use and benefit of the tribe freed from any claims by these half-breed claimants who entered upon and accepted benefits of the treaty of 1830.

On March 6, 1865, (14 U. S. Statute at Large, 667) a subsequent treaty was entered into between the Omaha tribe of Indians and the United States, by which it was provided, among other things, that the lands of the reservation should be allotted to the members of the tribe, "including their half or mixed blood relatives now residing with them." Two things are made definite and certain by article 4 of said treaty of 1865, to-wit: that the half or mixed blood relatives were spoken of as persons distinct from the members of the Indian tribe, and that neither the tribe nor the United States by said treaty of 1865 recognized any of the half or mixed blood relatives as entitled to reside upon or share in the allotments of the reservation, except such as were then and there residing with the tribe on the reservation on March 6, 1865, and which section by these terms excluded the half-breeds and mixed bloods who were residing on the Nemaha reservation.

"ARTICLE IV. The Omaha Indians being de-

sirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives *now residing with them*, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well defined exterior boundary. The whole of the lands, assigned and unassigned, in severalty, shall constitute and be known as the Omaha Reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any por-

tion of said reservation without the written permission of the Superintendent of Indian Affairs or the agent for the tribe. *Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively*, and that they are for the exclusive use and benefit of themselves, their heirs and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale or forfeiture, unless otherwise provided for by Congress."

Pursuant of said treaty of 1865 there was prepared under the rules and regulations prescribed by the department, an allotment book giving the names of the persons who were entitled to allotments, and a description of the lands so alloted and which was certified to and approved by the chiefs of the tribe, and by the Indian Agent, and by the Superintendent of Indian Affairs, and which allotment book was then and there prepared in the manner aforesaid so as to be a judgment and determination between the United States and the members of said tribe, as to who were and who were not entitled to an allotment of lands on the Omaha Indian reservation.

And it is conceded that no one of the complainants were included in said list. The heading recitals

of said allotment or tract book are as follows: (Rec. 171.)

"List of allotments made under the provisions of the IV Article of the treaty of March 6th, 1865, with the Omaha Tribe of Indians, in accordance with the prescribed rules and regulations of the Office of Indian Affairs approved by the Hon. Secretary of the Interior, Oct. 26th, 1867."

NAME OF ALLOTEE.							
INDIAN.			ENGLISH.				
MALE	FEMALE	AGE	SUBDIVISION	SEC.	T.	R.	A.

OMAHA AGENCY, NEBR., 12th Mo. 23, 1870.

We, the chiefs of the Omaha Tribe of Indians, in the State of Nebraska do hereby certify that the persons whose names are enumerated in the foregoing schedule are members of the Omaha Tribe of Indians, and entitled to selections of land in severalty under the provitions of the 4th Article of the treaty of March 6th, 1865, with the Omaha Tribe of Indians, and we further certify that the tract or tracts of land alloted and set opposite their respective names are in accordance with the above treaty, and we recommend that the Hon. Commissioner of Indian Affairs shall cause certificates to be issued to the different persons

named in the foregoing schedule for the different tracts of land as above selected and described.

The selections appearing on first page are set apart for use of Omaha Agency under the above treaty. The names erased by red lines are excepted in the foregoing allotments: (Rec., 182-183.)

Standing Hawk, his X mark. (SEAL)
Yellow Smoke, his X mark. (SEAL)
Fire Chief, his X mark. (SEAL)
Maha Ninga, his X mark. (SEAL)
Hard Walker, his X mark. (SEAL)
Shonga, Skah, his X mark. (SEAL)
Ebahom bah, his X mark. (SEAL)
Lion, his X mark. (SEAL)
Gi he gah, his X mark. (SEAL)

Signed in presence of Louis Saunsoci, his X mark, U. S. Interpreter.

H. CHASE, ex U. S. Int.
T. T. GILLINGHAM, Citizen.

OMAHA AGENCY, NEBR., 12th mo. 23, 1870.

I certify that the foregoing selections of land have been made from the Omaha Indian Reservation in Nebraska as allotments for the members of the Omaha tribe of Indians, whose names are set opposite the tracts respectively under the provisions of the treaty with said Indians, concluded March 6th, 1865, and in accordance with the rules and regulations prescribed by the Hon. Commissioner of Indian Affairs and approved by the Hon. Secretary of the Interior Oct. 26th, 1867. The selections on first page are for use of Omaha Agency under above treaty.

E. PAINTER,
U. S. Indian Agent.

OMAHA, NEBR., 1st Month 7, 1871.

I approve the foregoing selections, and recommend that certificates be issued to the allottees in accordance with the foregoing schedule.

SAMUEL M. JANEY,
Superintendent of Indian Affairs.

"DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN'S AFFAIRS,
January 21, 1871.

The foregoing list of allotments made under the 4th Article of the treaty with the Omaha Indians of March 6th, 1865, recommended by the chiefs and certified to by the agent of said tribe and approved by the Superintendent of Indian Affairs is respectfully submitted to the Secretary of the Interior for his approval.

H. B. CLUM,
(Rec., 185) Acting Commissioner."

"DEPARTMENT OF THE INTERIOR,
January 26th, 1871.

I hereby approve the foregoing list of allotments to Omaha Indians as recommended.

C. DELANO,
Secretary."

The said divisions and assignment of lands to the Omahas in severalty as set down in said allotment or tract book under the directions of the Secretary of the Interior, and having been agreed to by the Omaha tribe of Indians acting through their chiefs and having been approved by the Superintendent of Indian Affairs and approved by the Secretary of the Interior became "final and conclusive." (See the clause of Section 4 of the treaty of 1865 quoted *supra*, p. 6).

It is not claimed by any of the complainants that they were living upon the Omaha Indian Reservation

in the year 1865. They therefore do not come within the clause in Article IV, "including their half or mixed blood relatives now residing with them."

In any event the above allotment under the treaty of 1865 was a "final and conclusive" judgment by the Interior Department, that those named in the allotment book and those *only*, were entitled to allotments of land on the Omaha Indian Reservation.

The result is this, that no one of these complainants can justly claim an allotment of land on the Omaha Indian Reservation unless they can establish that they have become adopted into the tribe since the allotment of 1871 or under some act of Congress particularly conferring that right upon them.

In 1882 it became desirable to sell to white settlers that part of the reservation lying west of the right of way of the Sioux City & Nebraska Railroad Company. Should such sale be made the size of the reservation would become thereby reduced to that extent, and it would become necessary to readjust the allotments of land which had been made under the treaty of 1865. The result was that an act of Congress was passed under date of August 7, 1882 (22 U. S. Stat., 341), providing for the sale of that part of the reservation lying west of the Sioux City & Nebraska Railroad Company. Section 5 of said act provided for the re-allotment to the Omaha tribe of Indians of the remaining part of the reservation.

> "Sec. 5. That, with the consent of said Indians as aforesaid, the Secretary of the Interior be and he is hereby authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east

of the right of way granted to the Sioux City & Nebraska Railroad Company, under the agreement of April 19th, 1880, approved by the Acting Secretary of the Interior July 27th, 1880, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, and to each other person under eighteen years of age, one-sixteenth of a section; which allotment shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned, and certificate issued, or who was entitled to receive the same under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who, being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the

> Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void."

The allotment under Section 5, quoted *supra*, did not contemplate allotments to persons who were not entitled to allotments under the treaty of 1865, but it was the purpose and intent of Congress that the allotments under Section 5, of the act of Congress of 1882, should be to the persons who were entitled to allotments under the treaty of 1865 and to be issued in lieu of the allotments which had been made on the allotment book which had been approved by the Secretary of the Interior, January 26, 1871. Congress in Section 5, said: "which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the 4th Article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs as in said article provided."

It was provided in Article IV of the treaty of 1865, among other things, as follows:

> "Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively."

Reading the above clause from Article IV of the treaty of 1865, in conjunction with the above extract from Section 5 of the act of 1882, it becomes very

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clear that the allotments under the act of 1882 were to take the place of and be in lieu of the allotments set down in the allotment book of 1871. It further appears from the said readings *supra*, that the Commissioner of Indian Affairs had issued certificates to the allottees in the allotment book of 1871, and that the persons holding said certificates are the persons referred to in Section 5 of the act of 1882.

It will be conceded that no one of the complainants in the various suits made claim to an allotment of land under the treaty of 1865, and it will further be conceded that no one of the complainants had claimed the right to or had received a certificate of an assignment under the allotment of 1871, and, hence, that no one of the complainants in the pending suits fall within the designation of an "Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same under the provisions of said 4th Article."

Nevertheless, when it became known among the mixed bloods on the Nemaha Reservation that there would likely be or was about to be made a re-allotment of lands on the Omaha Indian Reservation, these complainants, one after an other, began intruding themselves upon the Omaha Indian Reservation, and making claims to lands to which they were not entitled. Some of the complainants made claims without even coming to the Omaha Reservation. The following table will show when the respective complainants came from the Nemaha Reservation to the Omaha Reservation, the length of residence upon the Reservation, and those who have never lived upon the Reservation.

Margaret Sloan, Doc. T, No. 174. Came to Reservation 1881. (Rec. p. 63 and p. 64).

Josephine Mitchell, Doc. T, No. 265. Came to Reservation 1894. (Rec. p. 340).

Emiel Peters, Doc. T, No. 266. Came to Reservation 1887. (Rec. p. 340).

Frank A. Peters, Doc. T, No. 267. Came to Reservation 1885. (Rec. p. 339).

Walter V. Peters, Doc. T, No. 268. Came to Reservation 1886. (Rec. p. 340).

Jacob Peters, Doc. T, No. 269. Came to Reservation 1899; removed 1892. (Rec. p. 340).

Sarah F. McCreary, Doc. T, No. 362. Came to Reservation 1893. (Rec. p. 65).

Jennie M. Arnold, Doc. T, No. 363. Came to Reservation 1890; removed 1892. Rec. p. 489).

Mary Monette, Doc. T, No. 364.. Come to Reservation 1890; died 1893. (Rec. p. 489).

Cassie M. Karch, Doc. T, No. 365. Came to Reservation 1890. (Rec. p. 489).

Thomas Barada, Doc. T, No. 460. Came to Reservation 1889. (Rec. p. 338).

Mary Sailors, Doc. T, No. 461. Came to Reservation 1883. (Rec. p. 339).

Artemesia Frost, Doc. T, No. 462. Came to Reservation 1893. (Rec. p. 65).

Edward Kuhn, Doc. T, No. 502. Came to Reservation 1883. (Rec. p. 338).

Ethel Rutledge, Doc. T, No. 503. Came to Reservation 1883. (Rec. p. 338).

Charles Frost, Doc. T, No. 504. Came to Reservation 1893. (Rec. p. 65).

Calestine Kuhn, Doc. T, No. 505. Came to Reservation 1883. (Rec. p. 338).

Stella Kuhn, Doc. T, No. 506. Came to Reservation 1883. (Rec. p. 338).

Philemon H. Frost, Doc. T, No. 507. Came to Reservation 1893. (Rec. p. 65).

Leonard Frost, Doc. T, No. 508. Came to Reservation 1893. (Rec. p. 65).

Maggie Rockwell, Doc. T, No. 509. Lives in State of Iowa. (Rec. p. 339).

Mitchell Monette, Doc. T, No. 574. Came to Reservation 1891. (Rec. p. 900).

John M. Sloan, Doc. T, No. 579. Never; lives in Aspen, Colorado. (Rec. p. 64).

The Interior Department, acting through Alice C. Fletcher, special U. S. Allotting Agent, in the years 1883-84, made allotments to the Omaha tribe of Indians under Section 5 of the Act of August 7, 1882. Such of the complainants as had then come to the Omaha Indian Reservation made application to the allotting agent for an allottment of land. In each and every instance the allotting agent found against the right of the complainants to an allotment of lands, and reported her findings of fact to the Commissioner of Indian affairs, and in each instance the Commissioner of Indian Affairs found and adjudged that the said complainants were not entitled to an allotment of lands on the Omaha Indian Reservation under the act of 1882. The reports of the special alloting agent, and the findings and rulings of the Interior Department

thereon against the complainants, will be found set out more at length in a subsequent part of this argument.

The Department of the Interior ruled that the act of 1882 related to the treaty of 1865 and that the treaty of 1865 limited the allotment "to members of the tribe, including their half or mixed blood relatives now residing with them." (Rec. pp. 135-6). That these mixed blood claimants were not residing with the tribe in 1865, and manifestly were not beneficiaries under said treaty in respect to the allotments therein provided. That neither the treaty of 1865 nor the act of Congress of 1882 "were intended as a general invitation to all persons, anywhere, who might be able to prove the existence of a drop or more of Omaha blood in their veins, to repair to the reservation and select an allotment. Manifestly such was not the intention, nor will any such construction be admitted in making the allotments." (Rec. pp. 139-141.) Wherefore and thereupon the Department of the Interior under date of October 5, 1883, issued its direction to the Indian Agent to remove the then mixed blood claimants from the Reservation. (Rec. pp. 140-142.)

The Peters family as will be seen from the table set down *supra*, came to the Omaha Reservation between the years 1885 and 1887, which were subsequent to the making of the allotments under the act of 1882, and subsequent to the ruling of the Interior Department against the claims of the mixed bloods who had come upon the Reservation in the year 1883, and subsequent to the direction of the Interior Department to the Indian Agent to remove said mixed bloods from the Reservation.

The Indian tribe became exasperated at the in-

trusion of the Peters family and under date of March 19th, 1888, the members of the tribe transmitted to the Commissioner of Indian Affairs a petition complaining of the intrusion of the Peters family, and requested the Interior Department to remove all these intruders from the tribal lands. (Rec. pp. 142-143.) The Commissioner of Indian Affairs thereupon reported the matter to the Secretary of the Interior, reciting in his said report the complaint of the Omaha tribe of Indians and the former rulings of the Indian Department with reference to the half-breed or mixed blood claimants, who had been provided for under treaty of 1830 by allotment of lands on the Nemaha Reservation, and likewise reciting in said report the rulings of the Interior Department against the claim of the Peters family and the Barada family and the Kuhn family, and in which said report the Secretary of the Interior was requested to determine the rights of the Peters family or their decendents, to land in the Omaha Reservation coupled with the suggestion that a determination of such rights on the part of the Peters family would settle the whole question as to the other mixed bloods similarly situated, and which said report requested authority to remove said Peters and all others of a like class, from the Reservation should the Secretary of the Interior determine that they were not entitled to allotments of land thereon. (Rec. pp. 149-154.)

Subsequently under date of December 5th, 1888, the Secretary of the Interior affirmed and ratified the rulings of the Indian Department, and then and there and thereby entered the final judgment of the Interior Department that Frank Peters (one of the complainants) was "not entitled to allotment of lands on the Omaha Reservation under the treaty of March 6, 1865,

and the provisions of the act of Congress August 7, 1882, and is upon the Reservation without authority and contrary to the wishes of the Omaha Indians." (Rec. p. 155).

The said judgment and order of the Interior Department authorized the Commissioner of Indian Affairs "to remove him (Frank Peters) and any other persons who may be thereon under a similar state of facts, from the Omaha Reservation." That pursuant to the said order and direction, the Commissioner of Indian Affairs instructed the Indian Agent to require Mr. Peters and others of a like class to remove from the Omaha Indian Reservation. Pursuant to said instruction, Robert H. Ashley, U. S. Indian Agent, on the 13th day of September, 1890, served a written notice on Frank A. Peters and others of like class, including Walter Peters, William Barada, Lot Sailors, Celestine Kuhn, Margaret Sloan, Thomas L. Sloan to remove from the Reservation. (Rec. p. 161).

Margaret Sloan in the year 1883 made application to allotting agent, Fletcher, for allotment of lands on the Omaha Indian Reservation, but which allotment was denied to her upon the ground that Margaret Sloan and her descendants were not entitled to allotments under the act of 1882, and the allotting agent under date of April 28, 1884, (rec. p. 146), made official report to the Commissioner of Indian Affairs adversely to the right of Margaret Sloan and her descendants to have allotments of land on the Omaha Indian Reservation, and which report was approved by the Commissioner of Indian Affairs under date of May 9, 1884. (Rec., p. 149).

The Indian Agent, pursuant to authority hereinbe-

fore referred to, to remove the Peters and Sloan families from the Reservation, did, under date of October 17, 1890, make addititional report to the Department "that I did on the 14th day of October, 1890, give written notice to Thomas L. Sloan and Margaret Sloan to leave the Omaha Indian Reservation under instruction of office letter of August 27th." "I would say in explanation that the Omaha Indians in council on the 7th day of October discussed this matter about the Sloans, and it was almost the unanimous opinion and wish that they be removed from the Reservation the same as Peters and others."

On January 12, 1891, a delegation of the Omaha tribe of Indians, duly accredited, appeared before the Interior Department in the City of Washington and protested against these mixed blood claimants being permitted to longer remain upon the Reservation, and thereupon the Commissioner of Indian Affairs reported the said facts to the Secretary of the Interior, recommending that the Secretary of War be requested to furnish military assistance to remove the mixed blood claimants from the Omaha Indian Reservation. (Rec., p. 163.)

Thereafter on the 13th day of January, 1891, the Commissioner of Indian Affairs instructed the Indian Agent that the said mixed blood claimants who were not entitled to lands or other benefits under the act of August 7, 1882, should not be enrolled by the Agent nor receive any share in the payment of annuities, and in said order and direction there were particularly named William Barada, Thomas Sloan, Mrs. Fulton Peters, Frank Peters, Walter Peters and Mrs. Sailors and their families. (Rec., pp. 164-165.)

It further appears on the record that none of the

mixed blood complainants had ever been enrolled or received annuities as members of the Omaha tribe of Indians, with the exception that Margaret Sloan and Antoine and Michael Barada had received two or three payments between the years 1855 and 1865, but which was before they had gone upon and received their allotment on the Nemaha Reservation. Artemesia Frost claims to have received one annuity payment in 1875 (Rec., p. 92), and the Agent, Spencer, made one payment to Margaret and Thomas Sloan in 1890, but why or wherefor is not disclosed. (Rec., pp. 66-204 to 211.)

The said Margaret Sloan, Thomas L. Sloan, William Barada, Frank Peters and Walter Peters, becoming advised that they could not be enrolled or receive annuities or allotments of lands, and that it was the intention of the Department to have them forcibly removed from the Reservation as trespassers and intruders thereon, filed a bill in equity in the Circuit Court of the United States for the District of Nebraska against the Indian Agent and members of the tribe, claiming that they, the complainants, were entitled to allotment of lands and to receive annuities, and praying an injunction enjoining the Indian Agent from forcibly removing them from the Indian Reservation, and upon the filing of said bill on the 30th day of January, 1891, an injunction was granted as prayed.

Issues were joined in the said case and a large amount of testimony taken and cause submitted to the court, and on the 25th day of April, 1893, the said court entered its decree dismissing the bill on the ground that the President of the United States is authorized to make such disposition of money and

property as he may think it advisable for the benefits of the Omaha Indians, and that his authority to do so cannot be restrained by injunction. (Rec. folio 106 107.)

The Interior Department having frequently ruled against the claims of these mixed bloods to annuities and allotments of lands on the Omaha Indian Reservation, and the said mixed blood claimants having failed by proceedings in court to obtain relief, resorted to a new expedient, to-wit: to have themselves adopted by the Omaha tribe of Indians, and to that end Margaret Sloan and Thomas L. Sloan procured petitions to be signed by a considerable number of the members of the Omaha tribe of Indians, requesting that their names should be placed upon the rolls as members of the tribe.

It is noticeable that the petition so signed and presented to the Interior Department did not recite that Margaret Sloan and Thomas L. Sloan were entitled to annuities or allotments of lands, but that their enrollment into the tribe might be a benefit to the tribe on account of the ability and character and knowledge of Thomas L. Sloan. To these petitions a vigorous protest was made by certain members of the tribe, and who asserted, among other things, that Thomas L. Sloan was seeking to secure by adoption into the tribe that which he had failed to secure before the Department, and in the United States Court, and that there were no reasons which could be given for the adoption of Thomas L. Sloan which might not be given for the adoption of any other white man. An investigation by the Interior Department disclosed that of the persons who had signed the petitions for the adoption of the Sloan's into the tribe, that twenty-

four of the signatures thereon were not written nor authorized by the person's whose names were set down; that fifteen names were signed twice; and that the petitions contained the names of boys and women not permitted to have a voice in such matters. The question of the adoption of the said Sloans into the tribe having been reported by the Indian Agent to the Commissioner of Indian Affairs, and by the Commissioner reported to the Secretary of the Interior, the Secretary of the Interior found and ruled that the Sloans were not entitled to adoption into the tribe, and in his said ruling and judgment said: "The facts presented seem to clearly establish the belief that it is the desire and wish of a majority of the members of the tribe, that the Sloan's be not admitted to membership, and it is so ordered." (Rec. pp. 156-158.)

This ruling was again affirmed by the Secretary of the Interior Nov. 17, 1896. (Rec. pp. 165-168).

Subsequently Artemesia Frost, who was a daughter of Margaret Sloan and a sister to the father of Thomas L. Sloan, and who is the mother of the complainants, Philemon H. Frost, Doc. T, 507; Sarah F. McCreary, Doc. T, 362; Charles Frost, Doc. T, 504; Leonard Frost, Doc. T, 508; made an application to the Interior Department, by petition and in person, to be admitted to membership in the Omaha tribe of Indians. The said application was considered by the Commissioner of Indian Affairs, and the facts by him reported to the Secretary of the Interior under date of June 16, 1897, and afterward on the 21st of June, 1897, the Secretary of the Interior made his ruling thereon, and wherein it was adjudged and determined that Mrs. Frost was not entitled to be admitted into membership of the Omaha

tribe of Indians, in which said judgment and rule, among other things, it was said: (Rec. pp. 168, 169).

> "As showing that the Omahas regarded that the claim of such mixed bloods were extinguished by the lands given them under the provisions of the treaty cited, the following provision was made in Article IV (4) of the treaty with them of March 6, 1865. (14 Statutes, 667-668.)
>
> "The Omaha Indians being desirous of promoting settled habits of industry and enterprise among themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, *including their half or mixed-blood relatives* now *residing with them.*" * * *
>
> When many of the mixed bloods from the Nemaha reserve went to the new reservation to acquire more land, after the passage of the act of August 7, 1882 (22 Statutes 341), which provided for the sale of a portion of the latter reservation and allotment of land in severalty, the Omahas strenuously objected and called upon the Department to remove these half-breeds from their reservation.
>
> By her own admission, Mrs. Frost's birthright claim has been extinguished. To admit her present claim would be an injustice to those of the tribe who have never received allotments, and who alone are entitled to participate in the division of the lands in the diminished reserve; would also be against public policy and a violation of the rules and regulations of the Department, which prohibit more

than one allotment to an Indian, for any reason whatever.

It will be one of our points of contention that these various rulings of the Interior Department are adjudications against the rights of these mixed-blood claimants to receive either annuities or allotments of lands on the Omaha Indian Reservation; that said judgments are final and conclusive; that said judgments and rulings were made before the commencement of the present actions; and that the act of Congress under which the present suits are being prosecuted was not intended, neither is it comprehensive enough in its scope and meaning, to confer jurisdiction on the court to reverse said judgments and rulings of the Interior Department.

There are many other matters of detail which we shall have occasion to deal with when we come to consider the cases made on the record by the individual complainants. The foregoing statement and historical recital is intended to deal only with general questions, principles and rulings that may affect the rights of all the complainants.

II

The Act of 1882 Dealt With the Omaha Tribe of Indians and Not With Individuals of Mixed Blood Who Did Not Then Sustain Tribal Relations.

The Allotments in Said Act Contemplated Were Allotments to Persons Who Then Were Members of the Tribe and Residing on the Tribal Lands.

The act of 1882 was an act to provide for the sale

of a part "of the Reservation of the Omaha tribe of Indians."

In the first sentence of the first section there is found this language: "With the consent of the Omaha tribe of Indians expressed in open council, the Secretary of the Interior be and he hereby is authorized to caused to be surveyed, etc."

The above phraseology necessarily implies that the authority of the Secretary of the Interior to cause to be surveyed and sold that part of the Reservation lying west of the Sioux City & Nebraska Railroad, depended upon obtaining the consent of the "Omaha tribe of Indians expressed in open council."

Clearly the words "Omaha tribe of Indians" were not intended to include all persons that might have Omaha Indian blood in their veins, because such persons might or might not be members of the Omaha tribe of Indians. But the words quoted from the first section of the act included only such persons as were then *members* of the "Omaha tribe of Indians," who were authorized to participate in the "council" of said Omaha tribe of Indians.

If we look at Section 3 of the said act we find that the proceeds of the sales of the land to be sold "shall be placed to the credit of said Indians in the Treasury of the United States," "which income shall be annually expended for the benefit of said Indians under the direction of the Secretary of the Interior."

Thus we see again that the act of 1882 was in the nature of a contract, or compact, between the United States and the said Omaha tribe of Indians. The proceeds of the sales of lands were to be expended for the benefit of the said Omaha tribe of Indians. The money was not to be paid by way of annuity to persons

of mixed blood unless they were members of the said tribe of Indians.

We are not dealing with the question whether mixed bloods might or might not be members of a tribe of Indians, or might or might not be adopted into a tribe of Indians, because we grant that under proper circumstances both conditions might exist. But we do insist upon it that a mixed blood who is descended from a free-born white father is not and cannot become a member of the Omaha tribe of Indians, unless such person has been adopted into said tribe with the approval and sanction of the Interior Department.

It is not contended in the case at bar that any one of the complainants has been adopted into the Omaha tribe of Indians. To the contrary, the proofs are that the Interior Department from the year 1883, when allotments under the act of 1882 first began, down to the present date, has repeatedly ruled and persistently adhered to the said rulings that the complainants are not members of the Omaha tribe of Indians, and have not been adopted into said tribe.

All this more particularly appears from the opening historical sketch of these cases and in another paragraph of this brief, wherein the said judgments and rulings are insisted upon as *res adjudicata* in bar of these proceedings.

The Sloan and the Frost families made formal attempts to be adopted into the tribe, but in both cases their right to adoption was denied by the Indian Department and approved by the Secretary of the Interior.

On the record it is quite clear that the complainants were not recognized either by the United States or by the "Omaha tribe of Indians" as members of said

tribe when the act of August 7, 1882, was passed. The rulings of the Interior Department heretofore referred to and hereafter more particularly recited are plain, decisive and often times repeated, that the mixed bloods who went upon the Nemaha Reservation and received an allotment of land thereon had thereby extinguished whatever right, if any, they ever had to membership in the "Omaha tribe of Indians."

Turning to Section 5 of the said act of 1882, we find that the authority of the Sectetary of the Interior to allot the lands lying east of the right of way of said railroad, was dependent upon "the consent of said Indians as aforesaid;" referring again to the consent of the Omaha tribe of Indians to be expressed in open council as provided in Section 1. The allotment provided for in Section 5 is to be "in severality to the Indians of said tribe;" referring again back to the words Omaha tribe of Indians."

The authority of the Secretary under Section 5 was confined to the making of allotments to the members of the "Omaha tribe of Indians." It was not an authority to make an allotment to persons who might have Indian blood in their veins, but who were not members of the said Omaha tribe of Indians who were parties to the act of 1882, and who in open council were to give consent to the sale of the lands lying west of the right of way of the railroad, and to the allotment of the lands lying east of the right of way of said railroad company.

More may be hereafter said upon the point that the act of 1882 was dealing with the Omaha Indians as a tribe, as it then and there existed in its tribal capacity, under the heading that the benefits of the act of 1882 were confined to the persons who were members

of the Omaha tribe of Indians in their tribal capacity at the date when the said law was enacted, and also under the heading that the allotments to be made under Section 5 of the act of 1882 were to be in lieu of the allotments which had been made in 1871 under the treaty of 1865.

III

The Genealogical Status and History of the Complainants is that of White Persons and not Indians. Not being Indians they could not become members of the Omaha tribe of Indians without being adopted into the tribe.

We think the rule of law is that children of a free born white father take the status of the father and not the mother. We shall hereafter see that such is the rule of law announced by the courts, and which has been followed by the Interior Department in dealing with Indian affairs.

All the complainants, with the exception of Mary Monette and her descendants, trace their family history back to Michael Barada, a free born full blood white man, and his wife, Taeglaha Hacienda, an Omaha Indian woman. This appears in the stipulation filed in the Sloan case in Doc. T., 174, (Rec. p. 62) and in the Peters case Doc. T., 267 (Rec., p. 336). From said marriage there descended two children who figure as the ancestors of complainants in these suits, to-wit: a daughter, Margaret Barada, hereafter spoken or as Margaret Sloan, and a son, Antoine Barada. The daughter Margaret and the son Antoine were one-half Indian blood through their mother, but

were one-half white blood and assumed the status of their father, a free born white man. (See table, folio 399.)

Margaret Barada was born about the year 1805. She was taken to the city of St. Louis by her father in 1811 for the purpose of her education, and where she thereafter continued to reside for a long period of years as hereafter recited. In the year 1830 Margaret married a free born full blood white man and a citizen of the United States by the name of Thomas Sloan. Said marriage took place in the city of St. Louis where at the time both parties resided. (See Stip. of Facts Doc. T., No. 174, Rec. p. 62.) That said Thomas Sloan and his wife Margaret continued to reside in the city of St. Louis until the year 1855. Thomas Sloan in 1855 became employed as an engineer on a Missouri River steamboat and his wife Margaret came to the Omaha Agency at Bellevue, Nebraska, and remained about one and one-half years and in 1857 Margaret went with her husband, Thomas Sloan and their children to the Nemaha Reservation—evidently for the purpose of receiving allotment under the act of 1854, for it appears that Margaret Sloan received an allotment on the Nemaha Reservation as a mixed blood Omaha for 320 acres of land. (Rec. p. 63.)

Thomas Sloan was employed by the government in 1858-9 to construct a mill on the Omaha Indian Reservation. He with his family lived on the Reservation during the period of said employment and thereafter returned to the Nemaha Reservation. (Rec. p. 63.)

Margaret Soan came to the Omaha Reservation in 1881 (See par. 5, Stip., Doc. T., No. 174, Rec. p. 62). Margaret Sloan at that time was 76 years of age. Her

husband Thomas Sloan never took up his residence on the Omaha Reservation. He was in ill-health; went east for treatment; and died in Aspen, Colorado, at the Home of his son, John M. Sloan, in the year 1893. (See par. 12, Stip., Doc. T., 174, Rec. p. 63.)

It will be seen from what has been said that Margaret Sloan was the daughter of a free born full blood white man; that she had not been brought up among the Indians as an Indian child, but was brought up and educated and lived with the white race in the city of St. Louis, learning both to speak the English and the French languages; adopted the habits and customs as well as enjoying the benefits of the civilization of the white race. Under these circumstances we insist that Margaret Sloan must be considered in law not as an Indian woman, but as a white woman. That Margaret Sloan could not become a member of the Omaha tribe of Indians except by being adopted into the tribe with the approval of the Interior Department.

Artemesia Frost nee Sloan, John M. Sloan and William E. Sloan were the children of Thomas Sloan and his wife Margaret. The said three children were three-fourths white blood and one-fourth Indian blood, and took the legal status of their father, who was a free-born full-blood white man and a citizen of the United States. The said children were not born on the Indian reservation, but were born in the city of St. Louis, where their parents resided, the dates of their birth being as follows: William E. Sloan, 1832; John M. Sloan, 1840; Artemesia Frost nee Sloan, 1848. The said Artemesia, William E. and John M. Sloan were brought up and educated in the city of St. Louis, the home of their parents, under the customs and

habits of civilized life as enjoyed and practiced by the white citizens of America. (See Stip. Doc. T, 175 par. 7. (Rec., p. 63).

Thomas L. Sloan is the son of William E. Sloan mentioned in the preceding paragraph. William E. Sloan married Catherene Karf, a full-blood white woman, in the city of St. Louis, in the year 1861, where both parties then resided. (See par. 8-9, Stip. Doc. T, 174, rec. p. 63.)

It is our contention that under the decisions of the court and the rulings of the Interior Drpartment that both the father and the mother of Thomas L. Sloan occupied the status of white persons, his mother being full-blood white woman and resident of the city of St. Louis, and his father being three-fourths white blood and the son of a free-born full-blood white man and resident of the city of St. Louis and a citizen of the United States.

Thomas L. Sloan was born in the year 1863 and continued to reside in the city of St. Louis until the year 1873. His father died in 1865, but his mother has continued to live in the city of St. Louis and is residing there at the present time. Thomas L. Sloan remained with his mother in the city of St. Louis until 1873, when he went to his grandmother, Margaret Sloan, on the Nemaha Reservation. He remained with Margaret from 1873 to 1877, when he went away for the period of three years, visiting various places, including Oregon and Washington, on the Pacific Coast, and Holland and Belgium, in Eurepe. He returned to Nemaha Reservation in the year 1880 and came to the Omaha Reservation in April, 1881. Soon after his grandmother came to the Omaha Reservation. Thomas L. Sloan continued to reside with his

grandmother, Margaret Sloan, until the year 1891, when Thomas L. Sloan moved to the town of Pender, state of Nebraska, and where he now resides and is engaged in the practice of law as a profession. (Rec. pp. 63-64.)

Thomas L. Sloan has not been adopted into the Omaha Indian tribe, but it elsewhere appears in this brief that Thomas L. Sloan, with his grandmother, Margaret Sloan, had desired the Omaha tribe of Indians to adopt them as members of said tribe, but as a result it was ordered and directed by the Secretary of the Interior that they be not admitted into membership. (Rec. pp. 156-8 and pp. 165-8.) It also appears that the Omaha tribe of Indians and the Department of the Interior has persistently denied that Thomas L. Sloan (and the other complainants) were members of the Omaha tribe of Indians, and refused them allotments of land on the ground that they were not members of the Omaha tribe of Indians and had ordered their removal from the Omaha Indian Reservation.

Thomas L. Sloan, by his own conduct and pursuit in life for the past ten years, has proven his actual status to be that of a white persons and not an Indian, in that he married a full-blood white woman; is engaged in the practice of law before the courts of the United States; is a citizen of the United States and does not appear to have any affiliation or connection with the Omaha tribe of Indians, except as the attorney for and chief manager of the interests of these complainants in their efforts to wrongfully take unto themselves a part of the lands which rightfully belong to the Omaha tribe of Indians.

John M. Sloan, a son of Thomas Sloan and Margaret Sloan, was born in St. Louis in the year 1840.

He was also educated in the city of St, Louis and continued to reside with his parents in the city of St. Louis until 1855, and was with the family when they lived on the Omaha Reservation in 1858-9 while his father was in charge of the construction of a mill on the Omaha Indian Reservation, and went with the family when they removed to the Nemaha Reservation where his mother received an allotment of land as a mixed blood Omaha. About the year 1880 he removed to the state of Colorado. He is an engineer by trade and is married to a full blood white woman and resides in the town of Aspen in the state of Colorado and has never had a residence on the Omaha Indian Reservation. (See par. 17, Stip., Doc. T. 174, Rec. p. 64.)

Artemesia Frost nee Sloan was born in St. Louis, 1848, and continued to reside with her parents Thomas Sloan and Margaret Sloan, in St. Louis and elsewhere, as did her brothers John M. Sloan and William E. Sloan. In 1870 she married Leonard L. Frost, who was a white man, having one-fourth Indian blood, but not of the Omaha tribe of Indians. (See par. 18, Stip., Doc. T. 174, Rec. p. 65.) Artemesia did not come to the Omaha Reservation to reside until the year 1893, when she was 45 years of age or more. Her legal status was that of her brothers John M. and William E. Sloan, to-wit: that of her father, Thomas Sloan, a free born full blood white man and not a member of the Omaha tribe of Indians. Artemesia Frost nee Sloan made an application to the Interior Department to be adopted into the Omaha tribe of Indians, and the same was reported thereon adversely by the Commissioner of Indian Affairs on the date of June 6, 1897, and afterward on the 21st of June, 1897,

the Secretary of the Interior ruled that Artemesia Frost was not entitled to be admitted into membership of the Omaha tribe of Indians. (Rec. p. 71 and Rec. pp. 168-9.

Philemon H. Frost, Sarah F. McCreary nee Frost, Charles Frost and Leonard L. Frost, complainants, are children of the said Leonard L. Frost and his wife, Artemesia Frost nee Sloan. It is agreed that the father of said Frost children was a white man and did not have any Omaha Indian blood, and that Artemesia, their mother, was the daughter of Thomas Sloan, who was a free-born, full-blood white man. It is further agreed that the said Frost children above named were all born before the date when Artemesia Frost took up her residence on the Omaha Reservation. So that it follows as a matter of course that the said Frost children were not born upon the Reservation. (Rec. p. 65).

Philemon was born in 1870, and was twenty-three years of age when his mother moved upon the Reservation in 1893. Sarah F. McCreary was born in 1872, and was twenty-one years of age at said time, Charles Frost was born in 1873, and was twenty years of age at said time, and Leonard Frost was born in 1876, and was seventeen years of age at said time. (See par. 19, Strip. Doc. T, 174, rec. p. 65). It may be further added as a result that the said Frosts were not children who were brought up among the Omaha tribe of Indians. It is further agreed that the Frost children were educated at the town of Highland in the state of Kansas. (See par. 18–20, Stip. Doc. T. 174, rec. p. 65.)

Sarah F. McCreary married a full-blood white man at Highland, Kansas, where she and her husband re-

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sided, and at a time before the Frost family removed to the Omaha Indian Reservation. (Rec. p. 65.)

Thus we see that the Sloan and Frost families are all descendants of white fathers through Michael Barada, Thomas Sloan and Leonard L. Frost, and that Margaret Sloan, the mother of the Sloan's and the grandmother of the Frosts, had but one-half Indian blood, and that William E. Sloan, the father of Thomas L. Sloan, and Artemesia, the mother of the Frost children, had but one-fourth Indian blood through their mother's side; but were white persons through their father, Thomas Sloan, a free-born, full-blood white man, and that no one of said persons have ever been adopted into the Omaha tribe of Indians. That they had all been born, brought up and educated among white people under the usages and customs of the white race and had taken on the civilization of the white race.

Antoine Barada, a son of Michael Barada, a free-born, full-blood white man, and a brother of Margaret Sloan, was likewise educated in the city of St. Louis and lived with his parents in the city of St. Louis and married Josephine Vien, a full-blood white woman; said marriage taking place in the city of St. Louis in the year 1836 where both parties resided. (Rec., p. 337).

Julia Barada, Euphrasia Peters nee Barada, Celestine Kuhn nee Barada and Thomas Barada, are children of Antoine Barada and his wife Josephine Vien, and therefore take the status of their parents, both of said parents being white persons and not Indians within the meaning of the law. The mother being a full-blood white woman and the father a half-blood, but the descendent of Michael Barada, a free-born full-blood white man. The said Barada children

were all born in the city of St. Louis with the exception of Thomas, who was born on the Nemaha Reservation, and the said children were educated in the city of St. Louis, enjoying the advantages and adopting the customs of the civilized white race. (See Stip., Doc. T., 267, Rec., pp. 337-8).

Julia Barada's second husband was M. V. Myers a full-blood white man from whom descended Garry P. Meyers. (Rec., p. 337).

Euphrasia Peters nee Barada, a daughter of Antoine Barada and Josephine Vien mentioned *supra*, was born in the city of St. Louis in 1837. In the year 1856 she married Fulton Peters, a free-born full-blood white man of German descent and a citizen of the United States, the said marriage taking place in the city of St. Louis, where both parties at the time resided.

Fulton Peters and his wife Euphrasia went to the Nemaha Reservation and remained long enough for Euphrasia to receive an allotment of land of 320 acres, and then returned to St. Louis where Peters worked on the construction of the bridge over the Missouri river at St. Louis from the years 1867 to 1874. They first came to the Omaha Reservation in 1883, and remained about two years when they went back to the Nemaha Reservation on the land which had been alloted to Euphrasia. Euphrasia died in 1888, and Fulton Peters still lives on the land allotted to his wife on the Nemaha Reservation. (See par. 10, Doc. T. 267, Rec. p. 338.)

Frank A. Peters, Mary Sailors nee Peters, Maggie Rockwell, nee Peters, Jacob Peters, Emiel Peters, Josephine Mitchell nee Peters are all children of Fulton Peters and his wife Euphrasia, and who therefore

take the status of their father Fulton Peters, who was a free born full blood white man and a citizen of the United States. (Rec. p. 338.)

If our line of argument shall hold good their mother Euphrasia was also a white person and not an Indian, by reason of the status of her father Antoine Barada and of her grandfather Michael Barada. The Peters children recognizing the fact that they were white persons and not Indians became married to white persons. Frank A. Peters married a full blood white woman. Mary Peters married Lot Sailors a full blood white man. Maggie Peters married Edward Rockwell a full blood white man. Jacob Peters married a full blood white woman. Josephine Peters married Walter Mitchell a full blood white man, and none of said persons were educated or brought up among the Omaha tribe of Indians, and have never been recognized as members of said tribe. (Rec. page 339.)

Celestine Kuhn nee Barada was one of the children of Antoine Barada and his wife Josephine Vein, and was therefore a white person and not an Indian by virtue of the status of her father, who was the son of Michael Barada, a free born full blood white man, and of her mother Josephine Vein who was a full blood white woman. Celestine married John Kuhn, who was a free born full blood white man. From John Kuhn and his wife Celestine there was descended *Edward Kuhn, Stella Kuhn, Ethel Kuhn Rutledge*, and from which it will be seen that the said Kuhns and Rutledge, complainants, are white persons and not Indians by virtue of the status of their father John Kuhn, who was a free born full blood white man and likewise through their mothers line of ancestry. None of the Kuhn family have ever been adopted into the Omaha

tribe of Indians, and their claim to annuities and allotment of lands has been constantly and persistently denied by the Omaha tribe of Indians and by the Interior Department.

(See par. 10-14 Stip. Doc. T., 267. Rec. page 338.)

Monette Family. Jennie M. Arnold, Mitchell Monette, David Monette and Cassie M. Karch are descendants of Mitchell Monette, who was a free-born full-blood white man and a citizen of the United States. In 1836 said *Mitchell Monette* married Mary Bono. Mary Bono was a daughter of Francis Bono, a free-born full-blood white man and a citizen of the United States, who had intermarried with Latadawe, a full-blood Omaha Indian woman. Mary Bono taking the status of her father must be treated as a white woman, and being married to Mitchell Monette, who was a white man, the children of the said marriage would be white persons, and not Indians through either line of descent. They certainly were white persons and not Indians by virtue of the status of their father, Mitchell Monette. None of the Monettes were born upon the Omaha Reservation, and none of them were brought up among the Omaha tribe of Indians, and none of them were ever adopted into the Omaha tribe. The Monette family did not move to the Omaha Reservation until the year 1890, and Mitchell Monette, the father, and Mary Monette, the mother, died during the year 1893. (Rec. pp 488-9.)

Jennie M. Arnold, nee Monette, was born in 1862, and married Dr. Arnold, a free-born full-blood white man, in the city of Brownville, in the state of Nebraska, in the year 1882. She thereafter lived with her husband in the city of Omaha until the year 1890, when she came to the Omaha Reservation and re-

mained about two years. In 1892 she removed from the Reservation to the town of Pender, where she engaged in the business of dressmaking until 1894, when she returned to the city of Omaha, and in which city she has ever since continued to live. Mrs. Arnold has two children, Benjamin and Don Arnold, both of whom were born in the city of Omaha. (Rec. p. 489.)

Mitchell Monette, Jr., was born in 1868, and married a full-blood white woman in 1890 and removed to the Omaha Reservation about the same date. (Rec. p. 489.)

Cassie M. Karch, nee Monette, was born in 1872 and married Jacob Karch, a full blood white man, in the town of Pender, state of Nebraska, in the year 1892. (Rec., p, 489.)

It will thus be seen that the members of the Monette family had a free-born, full blood white man for a father, and that each of them had married into the white race. The Monette family have never been adopted into the Omaha tribe of Indians, and their right to receive annuities and allotment of lands on the Omaha Indian Reservation have been persistently and continuously denied by the Omaha tribe of Indians and by the Indian Department.

Tribal capacity and the act of 1882: We have heretofore suggested that the act of 1882 was in the nature of a compact between the United States and the Omaha tribe of Indians in their tribal capacity. The enforcement of the provisions of the act of 1882 were dependent upon the acceptance by and the consent of the Omaha tribe of Indians. That consent was to be expressed in open council. It is quite evident that the United States, by that act, was intending to deal with only such Omaha Indians as were recognized by the

Omaha tribe as members thereof, and who had a recognized right to participate in the councils of the Omaha tribe of Indians.

It is clear beyond question that no one of these mixed blood complainants were recognized by the Omaha tribe of Indians in the year 1882, or at any subsequent time, as members of the Omaha tribe of Indians, neither were they ever recognized as having any right to participate in the councils of the Omaha tribe of Indians. As a matter of fact, none of the complainants were living with the Omaha tribe of Indians in the year 1882, except Margaret Sloan and Thomas L. Sloan, and even they were not recognized as having any affiliation with the Omaha tribe of Indians. The facts seem to us not only persuasive, but convincing, that no one of the complainants were members of the "Omaha tribe of Indians" within the meaning of that phrase as used in the act of August 7, 1882.

IV

Under the Law These Mixed-Blood Claimants Take the Status of Their Fathers and are White Persons and not Indians.

The adjudications of the courts are uniform to the point that the children of free-born full-blood white persons take the status of the father and not the status of the mother. The status of the child cannot be changed so as to transform that child into a member of a tribe of Indians by any process short of an adoption into the tribe with the approval of the Interior department. The mixed blood claimants cannot be heard to say that they are Indians simply because that

they may have a small quantity of Indian blood in their veins. Neither can the fact that some of the complainants or their ancestors may have received an allotment of lands on the Nemaha Reservation, transform them from the status of white persons to the status of Indians. But to this point we shall more particularly deal in another paragraph of this brief.

Expa1te Reynolds, 5 Dillon 394, is a case where the law upon this subject was somewhat elaborately considered in an opinion by Judge Parker. In the syllabi it is stated:

> "The condition of the offspring of a union between a citizen of the United States and one who is not a citizen, e. g., an Indian living with his people in a tribal relation, is that of the father. The status of the child in such case is that of the father. The rule of the common law and of the Roman civil law, as well as of the law of nations, prevails in determining the status of the child in such case."

In determining that case it becomes necessary to ascertain whether the status of Puryer was that of a white person or an Indian. Reynolds had been arrested for the killing of Puryer on the Reservation. It was conceded that Reynolds was a white person by nationality and by birth, and the question remained whether Puryer was an Indian, either by blood or by marriage into the Choctaw tribe. The proofs disclosed that both the father and mother of Mrs. Puryer had Indian blood, but that her paternal grandfather was a full-blood white man, and that she was born and raised in the state of Mississippi.

The court was of the opinion that the fact that Mrs. Puryer had some Indian blood in her veins

through both her father and her mother did not make her an Indian. Upon this point the court said, p. 402:

> "Does the quantum of Indian blood in the veins of the party determine the fact as to whether such party is of the white or Indian race? If so, how much Indian blood does it take to make an Indian, or how much white blood to make a person a member of the body politic known as American citizens? Where do we find any rule on the subject which makes the quantum of blood the standard of nationality? Certainly not from the statute law of the United States; nor is it to be found in the common law."

The court also elaborately considered and ruled on the point that the child took the status of the father, that such was the common law and that there existed no exception to this rule except in the case of an offspring of a connection between a free man and a slave woman. Upon this feature of the law the court said, pp. 403-4:

> "Their offspring follows the condition of the father and the rule *partus sequitur patrem* prevails in determining their status, (1 Bouvier's Institutes, 198, sec. 502; 31 Barb., 486; 2 Bouvier's Law Dictionary, 147; *Shanks vs. Dupont*, 3 Pet., 242). This is the universal maxim of the common law with regard to freemen—as old as the common law, or even of the Roman civil law, and as well settled as the rule *partus sequitur ventrem*—the one being a rule fixing the status of freemen; the other being a rule defining the ownership of property—the one applicable to different political communities or states, whose citizens are in the enjoyment of

the civil rights possessed by people in a state of freedom; the other defining the condition of the offspring which had been tainted by the bondage of the mother.

No other rules than the ones above enumerated ever did prevail in this or any other civilzedcountry. In the case of *Ludlam vs. Ludlam* (31 Barb, 486), the court says: "The universal maxim of the common law being *partus sequitur patrem*, it is sufficient for the application of this doctrine that the father should be a subject lawfully, and without breach of his allegiance beyond sea, no matter what may be the condition of the mother."

The law of nations; which becomes, when applicable to an existing condition of affairs in a country, a part of the common law of that country, declares the same rule. Vattel, in his law of Nations (page 101), says: "As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, these children naturally follow the condition of their fathers and succeed to their rights. * * * The country of the father is, therefore, that of the children, and these become true citizens merely by their tacit consent." Again on page 102, Vattel says: "By the law of nature alone, children follow the condition of their fathers and enter into all their rights." This law of nature, as far as it has become a part of the common law, in the absence of any positive enactment on the subject, must be the rule in this case."

The court in deciding the status of Mrs. Puryer as a result of the application of the foregoing rules of law, held that she was a white person through the

status of her paternal grandfather notwithstanding the fact that the time the murder was committed, she was living among the Choctaws on the Choctaw Reservation. The court said. p. 404:

> "The evidence in the case showing that the paternal grandfather of Mrs. Puryear was a white man, living in the state of Mississippi and not with an Indian tribe—a citizen of the state of Mississippi and of the United States —the principles above enumerated make her father a citizen of the United States, and subject to the jurisdiction of the courts thereof. The same principles would make, Mrs. Puryear a citizen of the United States, and subject to the jurisdiction of the courts thereof. That being the case, Mr. Puryear was married to a woman who was legally a member of the white race, or of the body politic known as citizens of the United States. He did not, therefore, become a Choctaw by marriage, but was a citizen of the United States, and being killed in the territorial jurisdiction of this court, it has jurisdiction, and the writ must be dismissed and the defendant remanded to the custody of the marshal."

If we apply the rule in the above case to the facts in the cases at bar, these mixed blood complainants would be white persons and not Indians, even though they were living on the Omaha Reservation by the consent of the Omaha tribe of Indians. Nothing could transfer them from that status into the Omaha tribe of Indians except adoption into the tribe approved by the Interior Department.

United States v. Ward, 14 Sawyer, 472, (42 Fed., 320) is a case where the defendant was indicted as an

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Indian under act of March 3, 1885 (22 Stat., 385). The question presented was whether the defendant, Francisco Ward, was an Indian within the meaning of said statute. The father of Francisco Ward was a full blood negro and his mother was a full blood Indian and the child was born on the Reservation. When very young the child was taken by his father from the Reservation to Los Angeles, where the child continued to reside with its father for a number of years. The child afterward returned to the Reservation and was living on the Reservation at the time when the crime was committed. Nevertheless under these circumstances the court ruled that the child (Francisco Ward) was not an Indian The court in stating the facts of the case said (p. 474):

> "In the present case it is a fact conceded by the respective counsel that the defendant's father was a full-blooded negro and his mother a full-blooded Indian; that he was taken by his father, when very young, from the Reservation, where he was born, to reside with the father in Los Angeles City, and he did so reside for a number of years, but has since returned to and lived on the Reservation, where the offense in question is alleged to have been committed. And the question now raised is whether the defendant is an Indian within the meaning of the act of March 3, 1885."

On the point that the child took the status of the father, and not the status of the mother, the court said (p. 474-5):

> "The statute of the United States nowhere define an 'Indian.' As a matter of fact, the defendant is no more an Indian than he is a negro, and no more a negro than he is an Indian. In the case of the *United States vs.*

Sanders, Hemp., 486, the court held that the quantum of Indian blood in the veins did not determine the condition of the offspring of a union between a white person and an Indian, but further held that the condition of the mother did determine the question; and the court referred to the common law as authority for the position that the condition of the mother fixed the *status* of the offspring. In the subsequent case of *Ex parte Reynolds*, 5 Dillon, 403, the court said that the first point decided in the *Sanders Case* was sustained by the common law, as also the last point, if applied to the offspring of a connection between a freeman and a slave. But in *Ex parte Reynolds* the court pointed out that 'by the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule, *partus sequitur patrem*, prevails in determining their *status*. (1 Bouv. Inst. p. 198, sec. 502; *Ludlam vs. Ludlam*, 31 Barb., 486; 2 Bouv. Law Dict., 147. *Shanks vs. Dupont*, 3 Peters, 242.) This is the universal maxim of the common law with regard to freemen—as old as the common law, or even as the Roman civil law, as well settled as the rule, *partus sequitur ventrem*—the one being a rule fixing the *status* of freemen, the other being a rule defining the ownership of property; the one applicable to different political communities or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom, the other defining the condition of the offspring which had been tainted by the bondage of the mother. No other rules

than the ones above enumerated ever did prevail in this or any other civilized country."

United States vs. Hadley 99 Fed. Rep., 437, is an interesting case by reason of the circumstances surrounding the life of Hadley. Hadley was more of an Indian than any of the complainants in this suit, as he was one-half Indian blood. That he went onto the reservation with his parents when he could not have been more than seven years of age, and thereafter continued to reside on the reservation and received an allotment of land, and yet it was ruled that he was not an Indian and could not be indicted as such under the act of March 3, 1885. The agreed facts as recited in the opinion are, p. 438:

> "It is agreed that the parents of the defendant were married under the laws of the territory of Washington in 1873; that the father is a white man and a naturalized citizen of the United States, and that the mother is an Indian and a member of the Yakima tribe of Indians; that the defendant was born off the reservation, in the county of Yakima, and went there with the parents to reside in 1881, where he now resides; that he has received land as an allotment under the act of congress of 1887, has his patent therefor, and is now holding said land."

On the point that Indian half-breeds who are born under the sanction of marriage, and whose father is a white man and not Indians the court said, p. 438:

> "Another class of Indian half-breeds are born under the sanction of marriage, the father being a white man and a citizen, and maintaining an independent home; and the mother, al-

> though an Indian, is, by her marriage and adoption of the habits of civilized life, entirely separated from her Indian tribal relatives. The half-breed children of such parents, born within the United States, reared and educated as other children of citizens, are by the provisions of the fourteenth amendment to the constitution, and by section 1992, Rev. St., made citizens of the United States, and are, in the eyes of the law, entitled to all rights, privileges and immunities of other citizens; and they are as distinct from the other class of half-breeds which I have described as any other civilized people are distinct from savages."

The court also ruled that the child took the legal status of his father and was a citizen of the United States. His status was fixed by his birth, and it was not changed by the fact of his subsequent residence on a reservation nor by the receiving of an allotment of land. On this point the court said, p. 438:

> "According to the admitted facts, the defendant in this case is by law given the legal status of his father, and is by birth a citizen of the United States; and I hold that he is not subject to indictment and trial in this court for an offense which is cognizable in this court only when committed by an Indian. The status of the defendant was fixed by the circumstances of his birth, and could not be changed by his subsequent residence upon an Indian reservation, and receiving and holding an allotment of Indian lands."

If the principles announced and applied to the facts in the above case be correct, no one of the com-

plainants in the pending suits can claim an Indian birthright, but all of them are white persons and citizens of the United States, for such was the status of their respective fathers.

The case of *Keith v. United States*, 8 Okla., 446, applied the same rule of construction to an act of congress of February 8, 1887, allowing Indians not residing upon a reservation to make settlement upon public lands and "to have the same allotted to him or her * * * as provided in this act for Indians residing upon reservations."

Keith claimed the right to an allotment from the public lands on the ground that he "was a member of the Arapahoe tribe and enjoyed all the rights of a member of such tribe." But the court ruled that these general averments were "controlled by the several special statements of fact made in the petition that he was born from a marriage between a white father, adopted into the tribe when a child, and a half-breed Indian woman.

The court said: p. 449.

> "The question was presented in *Ex parte Reynolds*, 5 Dill., 394, Fed. Cas. No. 11,719, and it was there concluded that the Indians being free persons, the common law rule that the offspring of free persons follows the condition of the father prevails in determining the status of the offspring of a white man, a citizen of the United States, and an Indian woman. The case was cited in the opinion of Assistant Attorney General Shields to the Secretary of the Interior, November 27, 1891, (13 Land Dec., 685) and the rule reannounced in the declaration that "children of such parents are therefore by birth not Indians, but citizens of

> the United States, and consequently not entitled to allotments under the act of March 2, 1889," which provided for allotments to the members of the tribe to which this woman belonged. The ruling made in *Ex parte Reynolds* was also cited and followed in the case of *United States v. Ward*, 42 Fed., 320, and will be followed here."

The principles of law announced in the above cases has been the basis of the rule established by the Interior Department. Some of the complainants in the pending suits put stress upon the point that they have occasionally received annuity payments. It is claimed that Margaret Sloan and Antoine Barada received occasional annuties between 1862 and 1865; that Artemesia Frost claims to have received an annunity in 1875; and Margaret Sloan and Thomas L. Sloan claim to have received one annunity from Indian Agent Spencer. But these incidental circumstances do not make said persons either Indians or members of the Omaha tribe of Indians.

Such circumstances connected with birth were presented and considered by the Interior Department in *Black Tomahawk v. Waldron*, 13 Land Dec., 683. The question presented in said case was whether Jane E. Waldron, claiming to be a Santee Sioux Indian, was "entitled to the allotment of lands on the ceded portion of the Great Sioux Reservation for which she is contending against Black Tomahawk," and to receive annuities.

The Secretary of the Interior referred the case to Assistant Attorney General Shields, who, in his opinion to General Noble, Secretary of the Interior, took the position that Mrs. Waldron was not an Indian, and

hence not entitled to an allotment of land. In his statement of the facts he said (p. 685):

> "It is clearly shown, however, that Mrs. Waldron's father, Arthur C. Van Meter, is a white man and a citizen of the United States. Her mother is a half-blood Indian, being born of half-blood parents, each of whom was the offspring of a union between a white man and an Indian woman. Where these parents of Mrs. Van Meter lived, whether with the Indians as members of some tribe or among the whites as citizens of the United States is not shown."
>
> It is admitted by all that Mrs. Waldron's name has since 1883, or 1884, been born upon the rolls at the Cheyenne River Agency, and that she has since then been receiving rations at the Agency."

In his statement of his conclusions, he quoted the cases of *Ex parte Reynolds*, 5 Dill., 394, and *United States v. Ward*, 42 Fed., 320, and proceeds, p. 686:

> "Under the rule laid down in the decisions cited, which rule is, in my opinion, a sound one and applicable to the case in consideration, Mrs. Waldron was born a citizen of the United States. Her claim that she is an Indian by virtue of being born of an Indian mother cannot be allowed. There is no allegation that she has taken steps to renounce her allegiance to the United States or to assume the rights and duties of a citizen of any other nation, tribe or people. The mere fact that her name was placed upon the roll of the Cheyenne River Agency and that she has for several years received rations as an Indian, is not suf-

ficient to sustain a claim of membership in that tribe."

He therefore concluded that Mrs. Waldron was not entitled to receive annuities and not entitled to an allotment of land.

The Secretary of the Interior, General Noble, in his opinion to the Commissioner of Indian Affairs, says, p. 684:

> In respone, I transmit herewith copy of an opinion of the Hon. Assistant Attorney General for this Department, in which I concur, wherein it is held that Mrs. Waldron is not an Indian, and was not at the date of the act of March 2, 1889, entitled to receive rations and annuities at the Cheyenne River Agency."

Black Tomahawk v. Waldron, 17 Land Dec., 457, is a rehearing of the case cited *supra*, (13 Land Dec., 683,) and the questions involved were elaborately considered in an opinion by Asst. Attorney General Hall to the Secretary of the Interior, August 18, 1893, and which was approved by the Secretary of the Interior. In that opinion were considered three questions pertinent to the issues in the pending cases, to-wit:

1. Mrs. Waldron took the status of her father who was a white man and not the status of her mother who was a half-breed Sioux Indian.

2. Where it was intended either by treaty or act of Congress to provide for such mixed bloods, they were so mentioned in the said act or treaty and are not included within the terms of an act or treaty which speaks only of the Indian tribe.

3. The treaty of 1830 was intended to separate the mixed bloods from the tribe, and the acceptance of

an allotment on the half-breed reservation extinguished the tribal rights.

By reason of the foregoing considerations we quote liberally from said opinion, pp. 460-464:

> As to the claim that, because the maternal great grandmother was an Indian. Mrs. Waldron is also an Indian, it is to be observed that under common law rule children follow the condition of the father and not of the mother. Under this rule, without going further back, Mrs. Waldron's father being a full blooded white man, she would be regarded as a white woman. But it is said that the civil law rule relating to slaves prevails among the Indians and the children follow the condition of the mother. If this be true, for reasons hereinafter stated, it is yet very doubtful if Mrs. Waldron's case is made out. * * * *
>
> In answer to the claim that the rule is changed in Indian tribes, he said:
>
> But in my researches I have not found that such a rule exists to the extent claimed. The counsel for Mrs. Waldron, in seeking to show the existence of the rule, refers to the desire shown on the part of the Indians to care for the half-breeds, mixed-bloods, and white men who have married Indian women, and cites quite a number of instances in different treaties with Indian tribes wherein special provision was made for the benefit of the classes spoken of; and to the list given by counsel might be added many more similar instances. From these facts he seems to argue that the rule was general that all such were regarded as entitled to share equally, with the Indians negotiating the treaties, in the benefit thereof.

It seems to me that the facts and citations, made by counsel irresistibly lead to the contrary conclusions, and show it was not thought by either party to the treaties that the general provisions thereof, in favor of the Indians of the respective tribes, were applicable to the half-breeds, mixed blood or squaw men, as the whites who marry Indian women are called, but that special provisions were necessary to include them.

* * * * * *

That Mrs. Waldron's mother and grandmother did not claim to be and were not regarded as Sioux Indians, entitled to participate in the tribal rights and share in its property, is abundantly shown by the fact that as half-breeds they claimed the benefit of Article 9 of the treaty of July 15, 1830, *infra*, setting apart the separate Reservation for the half-breeds, and under the act of July 17, 1854, received Sioux half-breed scrip in payment for their interest in said Reservation, an interest separate and apart from any possessed by the Sioux Indians proper, who were not recognized as having any right or interest in that Reservation, and received no part of the scrip authorized to be issued in payment therefor. The records of the Indian Office show that Mrs. Waldron's mother and grandmother received each scrip for four hundred and eighty acres, their allotted proportion of the land within said Reservation, the scrip issued to the Angie family aggregating 3,840 acres.

It seems to me that Mrs. Waldron's claim to an allotment in the Great Sioux Reservation might here be dismissed without further dis-

cussion, for, after these half-breeds thus had a large and valuable portion of the tribal property bestowed upon them, which, when divided, gave to each half-breed and each descendant of the mixed blood four hundred and eighty acres of land to sell, and which they did sell, it is hard to believe that it is the intention of the government to force the Sioux Indians to again divide their inheritance with them, or that it is the wish of the Indians to share equally with these remote descendants of ancestors, who themselves were not permitted to share equally with the tribe, because not of the full blood."

In *Ulin v. Colby et al.*, 24 Land Dec., 311, it was decided by the Secretary of the Interior, March 30, 1897, that children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father and are not entitled to allotments as Indians.

United States v. Higgins, 103 Fed., 348, may be cited against our point of contention, but it is not when its facts are considered, and the rule there announced cannot be of any avail to the complainants.

The question in the case was whether Alexander Matt was an Indian or a member of the Flat Head tribe of Indians, so as not to be subject to taxation under the laws of the state in which he resided. The facts of the case were these: The father of Alexander Matt was a Canadian Frenchmen, his mother a Piegan Indian. He was born in the year 1853 in what is now known as Montana, but which at that time was known and classed as Indian country. In 1866 or 1867 the parents of Alexander Matt moved into the Bitter Root Valley, among the Flat Head Indians. "Shortly after

the arrival of the father and mother of Matt in the Bitter Root Valley, his mother was adopted into the Flat Head tribe." The said adoption was so made at a council meeting of the chiefs of the tribe. "From that time on she and her children were recognized as members of the Flat Head tribe." The family moved to the Flat Head Indian Reservation, where Alexander Matt has continued to live for a period of 20 years.

The court said: "The evidence shows that the said Matt had been recognized as a member of the Flat Head tribe of Indians ever since his residence therein."

From the above statements it will be seen that the case on the facts is just the reverse of the status of the complainants in the pending suits. Neither the complainants nor their mothers have been adopted into the Omaha Indian tribe. Wherever adoption has been applied for it has been denied. (See the Sloan and Frost cases). No one of the complainants has been recognized as a member of the Omaha tribe of Indians for the last twenty-six years, as was Alexander Matt. The Omaha tribe of Indians have constantly and persistently refused to recognize the complainants as members of the Omaha Indian tribe, and both allotments and annuities have been refused them.

In the opinion the court said:

> "In determining as to what class half-breeds belong, we may refer them to the treatment and recognition the executive and political departments of the government have accorded them."

It will be noted that in the pending cases the executive and political departments of the government have denied that the complainants in the pending

suits are members of the Omaha tribe of Indians. If that principle is to control in the pending cases, the complainants are not Omaha Indians.

What was said by the court in the Higgins case applied only to *half-breeds* who lived with and were recognized by the Indians as members of the tribe. The court was only speaking of those who have *at least* one-half Indian blood in their veins. Such is not the condition of the complainants, as no one of the complainants is more than one-fourth Indian blood, and the majority of them only one-eighth or less.

In a subsequent part of this brief it will be made to appear that the living upon the Nemaha Reservation by certain of the complainants was not living in the Indian country and was not living with the Indian tribe. The lands of the Nemaha Reservation were allotted and patented to the mixed bloods in fee simple. When they accepted these patents they became merged into the general mass of inhabitants and citizens of the then territory of Nebraska.

Jefferies v. Ankeney, et al., 11 Ohio, 372 is a case where it was ruled that the child of a white man and a half-breed Indian woman was a white person under the constitution of the state of Ohio.

Lane v. Baker, et al., 12 Ohio, 237 is a case decided upon the same principle, in which it was ruled that Thomas Lane who had "more than one-half white blood," but who had both Indian and negro blood, was held to be a white person within the meaning of an act of the legislature relating to common schools which conferred its privileges upon "white persons."

If it be true that under the common law (and which has not been changed by any act of Congress upon the subject) that the children of free born white parents

take the status of the father it necessarily follows that the children of free born full blood white persons who are citizens of the United States, cannot put aside that status and become Indians or members of an Indian tribe without the consent of the United States.

> In *United States v. Boyd*, 83 Fed., 547, it is said:
> "The action or assent of the United States is absolutely essential in order to enable the Indian tribes or bands, or individual members of the same, to renounce the dependent condition caused by the state of pupilage in which the Indians have been since the adoption of the federal constitution."
>
> In *Elk v. Wilkins*, 112 U. S., 94, it is said:
> "The alien and dependent condition of the members of the Indian tribes, could not be put off at their own will, without the action and assent of the United States."

The converse of the proposition must be equally true; that citizens of the United States and the children of such white fathers cannot put aside their status, their duties and obligations as such, and become members of an Indian tribe, without the action and assent of the United States.

We have heretofore made the suggestion that the fact that Thomas Sloan, father of the Sloans, and Fulton Peters, father of the Peters family, and John Kuhn, the father of the Kuhn family, and Mitchell Monette, the father of the Monette family, were white men who had married women of mixed Indian blood, would not make them nor their children Indians, even though they were permitted to live for a time upon the Indian Reservation.

This direct question was ruled in *Stiff v. Mc-*

Laughlin, 19 Mont., 300. There the court said:

> "The marriage of a man not an Indian, to an Indian woman does not give him the status of a tribal Indian, nor does he acquire such a status from the fact that he resides upon an Indian Reservation with an Indian wife. Unless in the government's treaty with the Flat Head Indians themselves, or under some act of congress, a right was expressly given the Flat Head Indians to adopt persons other than tribal Indians of Washington territory into their tribe, no court would be justified in holding that any such right existed. Their treaty gave no such right to the Flat Heads as we have stated, and we know of no law conferring any such right. Nor from the fact that the United States authorities permitted Sloan to reside on the Reservation can it be reasonably inferred that he had acquired, or that it was intended by the government that he should acquire, the status of a tribal Indian."

Certainly this record is full of evidence that the Omaha tribe of Indians never interpreted the treaty of 1865 not the act of Congress of 1882 as including these mixed-bloods. For more than 20 years the tribe has been resisting the claims of these plaintiffs, hence these suits.

V

The Claims of the Complainants for Allotments of Lands on the Omaha Reservation Had Been Heard and Adjudged Against Them by the Department of the Interior Before the Bringing of the Present Suits Such Judgments Are Final and Conclusive, as The Courts Not Given Jurisdiction Under The Act of 1901 to Review or Reverse Said Judgments of the Interior Department.

We conceive the purpose of the act of 1901, was to confer upon the United States Circuit Court original jurisdiction to hear and determine the rights of a claimant to an allotment of land upon an Indian reservation. In other words, it is made a court of original, and not appellate jurisdiction in said matters. The Department of the Interior is at all times possessed of jurisdiction to determine and adjudicate upon the rights of claimants to allotments of lands on Indian reservations. The jurisdiction of the Interior Department still remains in force and effect. Prior to 1901 the Interior Department had exclusive jurisdiction over such matters. The act of 1901 conferred co-ordinate jurisdiction upon the Federal Courts.

The Federal Courts, under the act of 1901, have no right to sit as an appellate tribunal, to reverse the findings and judgments of the Interior Department theretofore rendered. Neither has the Interior Department any such right to review or reverse the judgments of the Federal Court rendered in such matters under the said act of 1901. The scope and purpose of the act of 1901 was to permit the claimant to assert his

right in the Federal Court, and have the same there litigated and determined, instead of being required to litigate his claim before the Interior Department. But it is equally true that if the claimant selected either the courts or the Interior Department as a tribunal through which he would litigate his claim, that such selection, when made and carried to a conclusion, would estop him from re-litigating the same claim in the other tribunal.

Having said this much by way of introduction to the interpretation to be put upon the act of 1901, let us look into the various findings and judgments which have heretofore been rendered against the rights of these mixed-blood claimants.

First Judgment. The Allotment Book under the Treaty of 1865, Approved January 26, 1871.

We have heretofore set out the proceedings had between the Omaha tribe of Indians and the Interior Department under the provisions of Article IV of the treaty of 1865, by which it was then and there determined who were the members of the Omaha tribe of Indians and entitled to share in the allotment of lands under said treaty on the Omaha Indian Reservation. (Rec. pp. 171-185,)

Under the 22d paragraph of the stipulation Doc. T, 174, it is recited: (Rec. p. 65, folio 98.)

> "That no one of either the Sloan, Barada, or Frost families mentioned in this stipulation received or had an assignment or certificate of assignment under Article 4 of the treaty of March 6, 1865 (14 U. S. Stat., 667). That a schedule of selections of land in severalty in accordance with said fourth article, showing

the names of those entitled to assignments of lands and their respective tracts, was duly certified by the chiefs of the Omaha tribe, and certified and submitted by the Omaha Indian Agent to the Commissioner of Indian Affairs, December 30, 1870, and approved by the Secretary of the Interior, January 26, 1871. That none of the names of the respective Sloan, Barada or Frost families in this stipulation mentioned appear on said schedule."

In the stipulation in the Peters case, Doc. T. 267 it is recited, (par. 24, Rec., p. 340):

"That no one of either the Barada, Sloan, Peters, or Frost families mentioned in this stipulation, received or had an assignment or certificate of assignment under Article 4, of the treaty of March 6, 1865, (14 U. S. Stat. 667). That a schedule of selections of land in severalty in accordance with said fourth article and the prescribed rules and regulations of the office of Indian Affairs, approved by the Hon. Secretary of the Interior, October 26, 1867, showing the names of those entitled to assignments of lands and their respective tracts duly certified by the chiefs of the Omaha tribe, and certified and submitted by the Omaha Indian Agent to the Commissioner of Indian Affairs, December 30, 1870, and approved by the Secretary of the Interior January 26, 1871. That none of the names of the respective families in this stipulation mentioned appear on said schedule."

In the stipulation relating to the Monette family Doc. T., 364, it is recited in par. 10: (Rec., p. 489).

"That no one of the Monette family or their ancestors mentioned in this stipulation re-

ceived or had an assignment or certificate of assignment under Article 4 of the treaty of March 6, 1865, (14 U. S. Stat., 667). That a schedule of selections of land in severalty in accordance with said fourth article and the prescribed rules and regulations of the office of Indian Affairs, approved by the Hon. Secretary of the Interior, October 26, 1867, showing the names of those entitled to assignments of lands, and their respective tracts was duly certified by the chiefs of the Omaha Tribe, and certified and submitted by the Omaha Indian Agent to the Commissioner of Indian Affairs, December 30, 1870, and approved by the Secretary of the Interior, January 26, 1871. That none of the names of the respective Sloan, Barada, Peters, Frost, or Monette families in this stipulation mentioned appear on said schedule."

We have heretofore said that the allotment under the treaty of 1865 was a "final and conclusive" judgment by the Interior Department; that these named in the allotment book and these *only* were entitled to allotments of land on the Omaha Indian Reservation.

Indeed there is no claim made by any of the complainants that either they or their ancestors were living upon the reservation, or were participating in membership in the Omaha tribe of Indians when the said allotment was made under the treaty of 1865. Neither is it claimed that any one of the complainants or their ancestors were "half or mixed blood relatives now residing with" the Omaha tribe of Indians, as provided in article 4 of said treaty of 1865.

Second Judgment, Euphrasia Peters Denied Allotment August 9, 1883.

A. C. Fletcher was appointed special United States Allotting Agent for the purpose of making allotments of lands on the Omaha Indian Reservation under the provisions of the act of 1882, and was such official during the years of 1883 and 1884. Euphrasia Peters, with her husband Fulton Peters, moved on the Omaha Reservation in 1883, and remained about two years when they returned to the lands patented to them on the Nemaha Reservation, and where Euphrasia died in the year 1888. (See par. 10 stip. Doc. T., 267, rec. p. 338).

Euphrasia was the mother of the various complainants by the name of Peters, including Mary Sailors, Maggie Rockwell and Josephine Mitchell, (rec. p. 338). In 1883 Euphrasia Peters made application to the alloting agent for an allotment of lands on the Omaha Reservation, and on which application the allotting agent made the following report to the Commissioner of Indian Affairs: (Rec. p. 134).

"UNITED STATES INDIAN SERVICE,
OMAHA AND WINNEBAGO AGENCY,
July 28, 1883.

HON. H. PRICE,
Commr. of Indian Affairs:

SIR:—I have the honor to submit the following typical case, and ask the approval of my decision.

Euphrasia Peters is the oldest of seven children of Antoine Barada, a half-breed Omaha, who has lived all his life apart from the Omahas.

Antoine married a French woman and his

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children were born and reared in St. Louis. Euphrasia, some 25 year ago married Mr. Peters, a white man, by whom she had several children.

All the Barada family took land in the half-breed Nemaha Reserve. Mrs. Peters' portion has dwindled to eighty acres and this is now mortgaged. After the passage of the bill, approved August 7, 1882, at the instance of her sister, Mrs. Provost, Mrs. Peters came up to the Omaha Reserve to establish her relationship and claim land here.

Mr. Peters is a carpenter and did service at St. Louis and on the Mississippi River for the government during the late war. He has excellent credentials as to character, and so has his wife.

According to the letter from the Secretary of the Interior dated June 1st, 1883, and enclosed in one from the Indian Bureau, I am instructed to carry out the allotments as "the law directs."

After careful consideration of just what that may mean, I have concluded that it means in accordance with Art. 4 of the treaty of 1865, of which the Act of August 7, 1882, is supplementary. Art. 4, of the treaty of 1865, defines those entitled to lands to be "the members of the tribe, including their half or mixed blood relatives now residing with them." This article therefore excludes all of the class of Euphrasia Peters from sharing in the present division of the land; moreover, the Indians, through their councilmen, inclined to insist upon a strict construction of this Art. 4. Since my arrival a full council has been held on the

subject of admitting these mixed bloods from Nemaha and elsewhere, at which Mrs. Peters and her sister were present, and the voice of the councilmen and the people was unanimous that mixed bloods be not allowed to take land under the present Act. It was urged that there would not be land enough for all the new comers and for members of the tribe living here. This objection is a serious one, and I know it to be well taken by my personal field observations.

The Omahas cannot afford to give these outsiders of their best land.

Therefore, in view of Article IV of the treaty of 1865, and of the unanimous wish of the tribe expressed in open council, I decide that Mrs. Euphrasia Peters is not entitled to an allotment of land on the Omaha Reserve.

Very respectfully,

A. C. FLETCHER,

Special U. S. Indian Agent."

The said report was approved by the Commissioner of Indian Affairs under date of August 9, 1883, as follows: (Rec. p. 136.)

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, August 9, 1883.

MISS ALICE C. FLETCHER,
Special Agent for the Interior Department, Omaha, and Winnebago, Agency, Nebraska.

SIR:—In reply to your letter of 28th ultimo, you are advised that your decision to the effect that Mrs. Euphrasia Peters is not entitled to an allotment of the land on the Omaha Re-

serve, is approved by me in view of your statements.

Respectfully,
H. PRICE,
Commissioner.

Third Judgment. The Case of Celestia Kuhn.

Celestia Kuhn was a sister of Euphrasia Peters and a daughter of Antoine Barada and his wife, Josephine Vein. Her case was similar to that of the Baradas and the Peters family, and she is the mother of complainants, Edward Kuhn, Stella Kuhn and Ethel Kuhn Rutledge. (Rec. p. 338.) Her case was reported to the Commissioner of Indian Affairs, under date of September 4, 1883. (Rec. p. 136.)

UNITED STATES INDIAN SERVICE,
OMAHA AND WINNEBAGO AGENCY,
Sept. 4, 1883.

HON. H. PRICE,
Commr. of Indian Affairs,

SIR: Your letter of July 30, marked L. 13664-83, in reference to the claim of Celestia Kuhn, to an allotment of land on the Omaha Reserve, and enclosing copy of her letter to Judge Dundy of Omaha, Neb., craving his influence with the Department in her behalf, is received.

The facts of the case are as follows:

Celestia Kuhn is one of the seven living children of Antoine Barada, an Omaha half-breed. She was born of a white mother (French) in St. Louis, and has lived all her life away from the Omaha tribe. She has at the present time land on the Nemaha half-breed Reserve. This last spring she came to the Omaha Reserve with her husband, a white

man, and their children, to claim relationship with the Omaha Indians and to secure, if possible, allotments of lands.

According to the letter of instructions received from the Department, under date of June 1st, enclosing a letter from Secretary of the Interior, directing me to allot the land as 'the law directs,' and that law being Art. 4, of the treaty of 1865, of which the bill approved Aug. 7, 1882, is supplementary, and Art. 4, distinctly stating that only the mixed bloods residing at the time with the Omahas shall be entitled to allotments of land, and as neither Antoine Barada or any of his children, including Celestia Kuhn, were at the time living with the Omahas, but residing on lands they had received by virtue of their mixed blood, on the Nemaha half-breed Reserve, I submit the following decision for approval:

That Celestia Kuhn, daughter of Antoine Barada, is not entitled to an allotment of land on the Omaha Reserve.

In this connection, I would call attention to my letter to the Department under date of July 28, stating the case of Euphrasia Peters, sister of Celestia Kuhn, and to your reply 'A. 14153-83, August 9,' containing your decision in that case.

Very respectfully,

A. C. FLETCHER,

Special U. S. Ind. Agent."

The Commissioner of Indian Affairs entered his order, ruling and judgment denying Celestia Kuhn the right to an allotment under date of September 13, 1883, as follows: (Rec. p. 138.)

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, September 13, 1883.

MISS A. C. FLETCHER,

U. S. Special Agent Omaha and Winnebago Agency, Nebr.:

M'DELE: I am in receipt of your report dated September 4, made in compliance with office Instructions of July 30, last, relative to the claim of Celestia Kuhn (nee Barada) to an allotment of land on the Omaha Reservation, under the provisions of the act of Congress approved August 7, 1882. (22 Stats. 341.)

After reciting the facts in the case, you express the opinion that the said Celestia Kuhn is not entitled to an allotment, and you ask that your decision in the case be approved.

It appears that the applicant is one of seven living children of Antoine Barada, an Omaha half-breed; that she was born of a white mother (French) in St. Louis. Mo., and has lived all her life away from the Omahas, until last spring, when she appeared on the reservation, with her husband (a white man) and children, with a view to securing, if possible, allotments of land.

The law under which the allotments to the Omahas are being made relates to the treaty of March 6, 1865 (14 Stats., 667), which should be taken as a guide in determining as to who are entitled to allotments.

The treaty provides that lands in severalty shall be assigned 'to members of the tribe, including their half or mixed blood relatives *now residing with them.*'

I find in the files of this office, a schedule, duly certified by the Chiefs of the Omaha

tribe, showing the names of those who were properly entitled to selections of land in severalty under the treaty aforesaid, and a description of their respective selections. Said schedule was duly certified by the Agent of the tribe under date December 30, 1870, approved by the Superintendent of Indian Affairs, and having been submitted to the Department by this office January 21, 1871, was approved by the Secretary of the Interior, January 26, 1871.

Neither the name of Antoine Barada, (the father) nor that of the applicant Celestia Kuhn, formerly Barada, appears on said schedule and it is proper to conclude therefore, that they were not recognized as members of the tribe, or half or mixed blood relatives residing with them.

If the applicant was not entitled to an allotment then and it is clear that she was not deemed to be, she certainly is not entitled now, having been in no manner identified with the tribe since that time, living apart from them until a very recent period, when it appears she went upon the reservation simply to claim a share of the tribal lands.

It would be absurd to contend that the treaty or the more recent act of Congress under which the allotments are being made, were intended as a general invitation to all persons everywhere, who by hook or crook might be able to prove the existence of a drop or two of Omaha blood in their veins, to come forward and receive an allotment; manifestly, such was not the intention, for it is not at all likely that there would be land enough on the entire reservation to go around in that way. Besides,

the recent action of the Indians in forbidding Mrs. Kuhn and others to remain on the reservation, shows that they would never have consented to any such disposition of their lands, and it is plain from the language of the act that it was not the purpose of Congress to do anything contrary to the wishes of the Indians.

Your decision in the case is approved, and Mrs. Kuhn and family should be notified to remove from the reservation.

Very respectfully,

H. PRICE,

Commissioner."

The Kuhn family persisted in remaining upon the Reservation, and against which the Omaha tribe of Indians protested, and desired that the mixed bloods who had come from the Nemaha Reservation should be removed from the Omaha Reservation.

This matter was reported by the allotting agent to the Commissioner of Indian Affairs, and thereupon the Interior Department took steps to enforce its judgment theretofore entered against the Peters and Kuhn families, who were the descendants of Antoine Barada and Josephine Vien, as appears by the following official document:

(Rec., p. 139.)

"UNITED STATES INDIAN SERVICE
OMAHA AND WINNEBAGO AGENCY,
September 25, 1883.

HON. H. PRICE,

Commr. of Indian Affairs.

SIR:—I am in receipt of your letter, dated September 13, No. 16623-83, relative to Celestia Kuhn.

The Kuhn family are disposed to test their

rights here. Although they had been told by the agent and myself that they could not select land and enter upon it until word had been received from the Department as to their application for allotments, they have settled upon claims, built a house and propose to remain. They depend upon political influence to push their claim.

According to the treaty, which is the law governing these allotments, the Kuhn family have no right here. The whole matter is set forth in my letter of the 4th inst., and in the answer received from the Department confirming my decision.

In view of the situation, and to forestall and preclude any further trouble and contention, I would respectfully ask the Hon. Commissioner if it would be possible to have his decision contained in letter No. 16623, dated September 13, 1883, confirmed by the Secretary of the Interior, that there may be no possible appeal left these people who are breeding much trouble among the Indians.

The tribe are unanimous against these mixed bloods remaining on the reservation. A council was held today in which the councilmen urged the government to free them at once from these people, who are trying to 'eat up the land.' Very respectfully,

A. C. FLETCHER,

Special U. S. Ind. Agent."

(Rec., p. 140)

"DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, October 5th, 1883.

MISS A. C. FLETCHER,

U. S. Special Agent, Omaha and Winnebago Agency, Nebraska.

M'DLLE:—Referring to your letter of the 25th ultimo regarding the Kuhn family, who declare to you their intention to remain on the reservation and test their rights, in defiance of the authority of this office, I have to say that I have by letter of this date directed Agent Wilkinson to take immediate steps to remove said family beyond the limits of the reservation.

A copy of my letter to Agent Wilkinson is enclosed herewith for your more complete information.

Very respectfully,
H. PRICE, Commr."

(Rec., p. 140.)

"DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, October 5th, 1883.

GEO. W. WILKINSON, ESQ.,

U. S. Indian Agent, Omaha and Winnebago Agency, Nebraska.

SIR:—Miss A. C. Fletcher, U. S. Special Agent, reports to this office under date of September 25, 1883, that a family by the name of Kuhn have taken up lands and built a house on the Omaha Reservation, announcing their intention to remain there in defiance of the recent decision and directions of this office in their case.

It appears that this family removed to the reservation in the spring of the present year,

with a view to securing an allotment of land under the provisions of Section 5 of the Act of August 7, 1882, (22 Stat., 341) by virtue of the relationship they claim to the Omaha Indians.

The facts of the case as reported by Miss Fletcher in letter of September 4th, last, are substantially as follows:

Celestia Kuhn is one of the seven living children of Antoine Barada, an Omaha half-breed; she was born of a white mother (French) in St. Louis, and has never lived with the Omaha tribe. She has a white husband and children, who accompanied her to the reservation on her removal there in the spring. Neither Antoine Barada (her father) nor any of his children were living with the Omahas at the date of the treaty of 1865, (14 Stat., 667) but were living upon lands secured to them by the provisions of a former treaty, Article X treaty July 15, 1830. Stat., Vol. 7, p. 330.

Accordingly Miss Fletcher decided that Celestia Kuhn was not entitled to an allotment and asked for the approval of her decision by this office.

By letter of September 13, 1883, Miss Fletcher was advised that her decision was approved, and at the same time directed to notify Mrs. Kuhn and family to remove from the Reservation.

That the law under which the allotments to the Omahas are being made relates to the treaty of March 6, 1865, there can be no question. That treaty provides that lands in severalty shall be assigned 'to members of the tribe, including their half or mixed blood relatives *now residing with them*.' I believe it is not

contended and it seems perfectly clear that the present claimant was not living with the tribe at the date of said treaty. Manifestly then she was not a beneficiary under said treaty in respect of the allotments therein provided; for only those half or mixed blood relatives *then residing* with them could be so entitled.

The Omahas had already (by a former treaty July 15, 1830), provided for such of their half-breed brethren as were not residing with them at the date of the treaty aforesaid, and it was undoubtedly by reason of such prior beneficial provision that the restriction was made in the treaty of 1865, limiting the allotments to 'the half or mixed blood relatives *then residing with them.*'

This very Barada family had thus been provided for, and I find that 320 acres of land were allotted and patented to Celestine Barada, individually, within the Nemaha half-breed reserve, where it appears she and her father were living when the treaty of 1865 was concluded.

In the record of this office there is a schedule duly certified by the chiefs of the Omaha tribe, showing the names of those who were properly entitled to selections of land under the treaty of 1865, aforesaid.

Neither the name of Antoine Barada (the father) nor that of Celestia, Barada or Kuhn appears thereon, and it is proper to conclude that they were not recognized either as members of the tribe or half or mixed blood relatives residing with them. If Mrs. Kuhn was not entitled to an allotment then, she certainly is not entitled now. The conditions remain the same.

She has in no manner been identified with the tribe since that time; has not been adopted into the tribe, nor lived with them until the very recent period spoken of.

As was remarked to Miss Fletcher, it would be absurd to contend that the treaty of 1865, or the more recent act of congress under which the allotments are being made, were intended as a general invitation to all persons, everywhere, who might be able to prove the existence of a drop or more of Omaha blood in their veins, to repair to the Reservation and select an allotment. Manifestly, such was not the intention; nor will any such construction be admitted in making the allotments.

It is not at all likely, in the first place, that there would be land enough on the entire Reservation to go around in that way, and it is clear, from the recent action of the Indians in forbidding Mrs. Kuhn to remain on the Reservation, that the Indians would never have consented to any such disposition of their lands, and the language of the act shows that it was not the intention of Congress to do anything contrary to the wishes of the Indians.

It appears from Miss Fletcher's report of the 25th of September, to which reference has been made, that the Omahas are unanimously opposed to permitting Mrs. Kuhn and family to remain on the reservation, and that their presence there is breeding trouble. In a council held on the above date they urged that the Government take steps to relieve them of the burden of these people.

In view of the decision made in their case by Miss Fletcher and approved by this office,

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and holding that they have no right to remain on the reservation, I have to direct that you take immediate steps to remove them beyond the limits of the reservation, using your police force for that purpose if it shall be found necessary.

Very respectfully,

H. PRICE,

Commissioner."

That pursuant to the above instruction of the Commissioner of Indian Affairs to the Indian Agent, Celestia Kuhn was notified to leave the reservation, as appears in the following notice which was served upon her. (See stipulation, par. 25, Doc. T. 174, (Rec. pp. 68-69).

"OMAHA AND WINNEBAGO AGENCY, NEB., }
October 15th, 1883. }

MRS. CELESTIA KUHN,

Omaha Reservation, Nebraska,

MADAM:—The Honorable Commissioner of Indian Affairs by letter of October 15th, 1883, makes a decision in your case against your right to hold land on the reservation.

The points cited are as follows, viz.:

1st. That neither Antoine Barada, the father, nor his daughter were living with the Omaha tribe of Indians at the time of the treaty of 1865.

2nd. That Antoine Barada and his family were provided for on the Nemaha half-breed tract under treaty of July 15, 1830.

3rd. Neither the name of Celestia Kuhn, nor the father, Antoine Barada, appears in the schedule duly certified by the Chiefs, showing the names of those who were properly entitled to selections of land under treaty of 1865,

and if she was not entitled then, she is not now.

4th. 'She has in no manner been identified with the tribe since that time; has not been adopted into the tribe nor lived with them until the very recent period spoken of.' The Hon. Commissioner of Indian Affairs after citing the above points as the grounds of his adverse decision then issues an order to me as follows:

'I have to direct that you take immediate steps to remove them beyond the limits of the Reservation, using your police force for that purpose if it shall be found necessary.'

You see that the above order is imperative and I have no choice but to obey.

You will therefor please take such steps within a reasonable time, say ten days, as will relieve me of any unpleasant duties in obedience to the above order.

Very respectfully,

GEO. W. WILKINSON,

U. S. Indian Agent.

Fourth Judgment. Margaret Sloan and Her Descendants Are Not Entitled to Allotments as per Department Ruling Under Date of May 9, 1884.

Margaret Sloan is the mother of Artemesia Frost, nee Sloan, John M. Sloan and William E. Sloan. William E. Sloan was the father of Thomas L. Sloan (Rec., p. 63) and Artemesia is the mother of the complainants, Sarah F. McCreary, nee Frost; Philemon H. Frost, Charles Frost and Leonard Frost. Margaret Sloan made application for allotment of lands for herself and family (Rec., p. 65). The allotting agent made a report on this claim under date of April 28, 1884 (Rec., p. 67),

and the Department ruled under date of May 9, 1884 (Rec., p. 68), "that neither Margaret Sloan nor her descendants are legally entitled to allotment of lands on the Omaha Reservation under the act of August 7, 1882."

The report of the allotting agent and the ruling of the Department thereon are as follows (Rec., p. 67):

"UNITED STATES INDIAN SERVICE,
OMAHA AND WINNEBAGO AGENCY,
April 28, 1884.

HON. H. PRICE,

Commr. of Indian Affairs.

SIR: I would respectfully submit the following decision in the case of Mrs. Margaret Sloan for approval.

Margaret Sloan is the daughter of a full-blood Omaha woman and Michael Barada, a white man. She was born at Fort Calhoun, Nebraska, and taken early in life to St. Louis, Mo., to be educated, where she married Thomas, Sloan, a white man, and afterward lived in St. Louis, Mo., and upon her allotment of land given her as a half-breed Omaha in the Nemaha Reservation. During her youth and early married life she made a few visits to her relatives living with the Omaha tribe. In 1857 Thomas Sloan was appointed to take charge of the mill then being built on the Omaha Reservation and removed thither with his wife Margaret and their three children—William, 19 years; John, 11 years, and Artemesia (now Mrs. Frost), 4 years of age. Mr. Sloan remained at the mill in the government employ for two or three years. This period constitutes the only residence of Mrs. Sloan upon the Omaha Reservation up to 1881, when

she returned here with her grandson, Thomas L. Sloan, the only child of her deceased son, William, who entered upon land and has made considerable improvements on his claim.

Mrs. Sloan claims a rights to an allotment under the act of August 7, 1882, as she states that her husband, Thomas Sloan went into the army after he left the mill on the Omaha Reservation, and was in the army in the year 1865; and that as he entered the army from this place, his residence was the Omaha Reservation, and her constructive residence was that of her husband's.

Her claims have been fully investigated in an open council of the tribe, and I have waited two months for further evidence promised by Mrs. Sloan tending to establish her husband's entrance into the army from the reservation, but feel it now to be my duty to no longer delay action in her case.

According to evidence given by the Indians, Thomas Sloan and his family left the Reserve in 1860, and, according to all I can learn, his point of departure into the army can have no bearing on her case. By her own statement and the testimony of other persons, Mrs. Sloan was not living with the Omahas at the time of the treaty of 1865, but upon her land on the Nemaha Reserve, nor do the tribe in any way admit her claim to land here.

Therefore, in view of all the evidence I have been able to gather, I am constrained to decide that neither Mrs. Margaret Sloan nor her descendants are legally entitled to allot-

ments of land upon the Omaha Reservation under the act of August 7, 1882.

I enclose the sworn statement of Thomas Sloan as to his whereabouts in 1865, which is the only written evidence furnished me by Mrs. Sloan.

Very respectfully,
A. C. FLETCHER,
Special U. S. Indian Agent."

(Rec. p. 68.)

"DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
May 9th, 1884.

MISS. A. C. FLETCHER,
U. S. Special Agent, Omaha and Winnebago Agency, Nebraska:

M'DELE: Referring to your letter of April 28, 1884, asking that your decision in the case of Mrs. Margaret Sloan, applicant for an allotment of land on the Omaha Reservation, under the act of August 7, 1882, be approved, I have to say that I concur in the views expressed in your letter, and therefore approve your decision, 'that neither Mrs. Margaret Sloan nor her descendants are legally entitled to allotments of land on the Omaha Reservation under the act of August 7, 1882.

Very respectfully,
H PRICE,
Commissioner."

Fifth Judgment. The Peters Family Adjudged to be Intruders and Trespassers Upon the Reservation.

The complainant, Frank A. Peters, is a brother of complainants, Mary Sailors, Maggie Rockwell, Jacob Peters, Emiel Peters and Josephine Mitchell, the de-

scendants of Fulton Peters, a free born, full blood white man, and his wife, Euphrasia Barada, a one-fourth blood Indian. Rec. p. 338.)

Frank A. Peters was on the Omaha Reservation one week during the year 1883, (rec. p. 339) evidently at the time that his mother, Euphrasia, was denied the right of an allotment, heretofore set out under the heading, Second Judgment, *supra*. Frank A. Peters returned to the Omaha Reservation subsequently, and selected and began to cultivate a part of the Indian lands. The Indians objected to the intrusion of Frank A. Peters and of the other members of the family and their relations, who had also come upon the Reservation, asserting that if Frank A. Peters had a right to remain upon the Reservation, that they would also remain. To this intrusion of Frank A. Peters and other members of the family, the Omaha tribe of Indians presented to the Commissioner a formal protest under date of March 19, 1888, as follows: Rec. pp. 343-6 and rec. pp. 142-3.)

OMAHA, AGENCY, NEB.,
March 19th, 1888.

Hon. Commissioner of Indian Affairs.

SIR:—Our interview with yon in Washington was so short we could not tell you all about intruders on our tribal land. There is a man named Frank Peters, who, although he has Omaha blood in him, is not entitled to land on our Reservation. He belongs to one of the mixed blood families who were provided with land by us on the Nemaha Reservation, and who were excluded by us in our treaty of 1865 from taking land on this Reservation. Our land was alloted and patented to us under the rules of this treaty, we were told. We

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knew that this Peters family tried to take land when our Reservation was alloted to us four years ago and that they had a chance to state their case, and the tribe told their side, and that the case was sent on to Washington and was decided according to our treaty, and the Peters family had to go away. They have been threatening to come back, ever since. Last year Frank Peters came back selected land in Township 24, Range 8, and broke forty acres. We told him to stop and go away. He laughed at us and said he would not go until the Government should come and take him off. We have asked to have him sent away, but nothing has been done. This winter other members of his family and their relations have come up and they say that if Frank Peters stays they will break land and stay here, too. We have asked people who know the law what we should do to save our land. We were told to tell you all about the case, and that you will get the Courts to take the intruders off our land. The law under which our land was allotted says that the Government will hold the land safe for us twenty-five years, and that the land patented to the tribe shall be held just as safe as our individual land. If this man Peters or any other person is permitted to settle on trible land, and the Government does not, by its law, take the man away, we cannot feel sure that our own farms will be kept safe, for the promise is the same for our individual and our tribal land. The law says that our children born during the twenty-five years shall have their allotments on the tribal land. These intruders have selected some of the best of our

unallotted land. Some of the tribe did not listen to good advice when our reservation was allotted; they thought they could not live away from the timber, out on the prairie, but they see their mistake now. Their farms are poor and they want to take land for their young children out on the prairie and farm there, but these intruders are keeping us off good land.

We respectfully ask that you take action to remove all intruders from our tribal land. Frank Peters will soon put in his crops and we do not want him allowed to do so. If this man is permitted to stay, there are a hundred who will make the same claim, and we be defrauded of our property.

Respectfully,

The signatures to the above protest found in the certified record cover more than two pages of legal cap, and most of whom are personally known to the writer of this brief as being among the oldest and most influential members of the Omaha tribe of Indians. (Rec. pp. 143-144).

The Commissioner of Indian Affairs under date of November 14, 1888, made his report to the Secretary of the Interior upon the said petition of the Omaha tribe of Indians, for the removal of Frank Peters, and recommended his removal and requested authority to remove the said Peters from the Reservation if the ruling of the Commissioner of Indian Affairs should be approved, and which said report is, as follows: (Rec., pp. 149 to 154).

"DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, November 14, 1888.

To the Honorable, the Secretary of the Interior,

SIR:—I have the honor to submit the following quoted petition from Indians of the Omaha Reservation, in Nebraska, relative to one Frank Peters, with a statement of the action heretofore taken by this office in similar cases." * * * * *

(Then follows a copy of the petition of the Indians under date of March 19, 1888, quoted *supra*). * * * * *

"The allotment of land on the Omaha Reservation was made under provisions of the act of Congress, approved August 7 1882, (22 Stat., 341); and the said act expressly stipulates and provides that the said allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for whom, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said Article provided.

The Fourth Article of the Treaty of March 6, 1865, therein referred to (Stat. 14, 668), extended the benefits conferred thereby, in respect to allotments, to such only of their half or mixed relatives as were *residing with them* at the date of the treaty, the language of the said Article being, "including their half or mixed blood relatives now residing with them."

It will be observed that the Indians of the Omaha Reservation in their complaint to this office, charge that Frank Peters is not enti-

tled to land on their Reservation; that they admit that he has Omaha blood in his veins, being of the mixed-blood families who were provided with land by them on the Nemaha Reservation, that the mixed bloods were excluded by the Omahas in their treaty, of 1865, from taking lands on their Reservation; that the Peters family tried four years ago when allotments were being made to the Omahas to obtain allotments; that they, the Peters family, and other mixed bloods, were denied the right to allotments by the Omahas, and they ask for the removal of Frank Peters from their Reservation.

It may be remarked here that as soon as the law became known (I refer to the Act of August 7, 1882, providing for the sale of a portion of the Omaha Reservation and the allotment of lands in severalty to the members of the tribe), a number of mixed bloods from the old Nemaha Reservation came to the Omaha Reservation in the hope of securing allotments under the new law.

Some of them were born among the Omahas, and none of them had been with the tribe for years—some ten and others twenty or thirty years.

The Indians of the reservation manifested the most determined opposition to their being allowed to participate in the distribution of the land, and from time to time individual cases were reported to this office by the special agent charged with the work of allotting the lands, for decision as to the right of the parties to receive allotments.

As showing the position taken by this office

in deciding the cases of these absentee half or mixed bloods, the following is quoted from a letter addressed to the Special Agent on September 13, 1883, in the case of Celestia Kuhn, a sister of Mrs. Peters and a member of the Barada family.

* * * * * *

(Here follows a liberal quotation from the letter of H. Price, Commissioner of Indian Affairs, to Special Agent Fletcher, under date of September 13, 1883, quoted *supra* under heading, Third Judgment.)

"In order that the Department may further understand the views entertained by this office relative to the half or mixed blood members of the Omaha tribe not residing with them at the date of the treaty of March 6, 1865, I refer to the case of Mrs. Euphrasia Peters and the action of this office thereon.

The last mentioned case was reported to this office by Miss Fletcher, under date of July 28, 1883, as a test case."

* * * * * *

(Thence follows a liberal quotation from the report of Special Agent Fletcher to the Commissioner of Indian Affairs, under date of July 28, 1883, quoted *supra* under heading, Second Judgment).

* * * * * *

"In pursuance of Article 4 of the treaty of March 6, 1865, and the unanimous wish of the Indians in open council, Miss Fletcher decided that Mrs. Euphrasia Peters was not entitled to an allotment of land on the Omaha Reservation."

By letter of August 7, 1883, Miss Fletcher

was advised that her decision in the case of Mrs. Euphrasia Peters was approved by this office.

From the foregoing it will be observed that, under the construction placed upon the act of August 7, 1882, by this office, none but members of the tribe and their half or mixed blood relations residing with them at the date of the treaty of 1865, whose names are borne upon the duly certified census roll of 1871, or their descendants, and such others as may have been lawfully admitted into the tribe, would be entitled to receive allotments of land thereunder.

The party, Frank Peters, against whom complaint is made, is a mixed blood Omaha. He is not adopted by the tribe on the Omaha Reservation; he was not residing with them when the treaty of March 6, 1865, was made; his name is not borne upon the duly certified roll of 1871, submitted by the Omaha Council disclosing the names of all Indians or mixed bloods entitled to lands on the Omaha Reservation.

It would appear, therefore, that the said Peters is not entitled to allotment of lands on the Omaha Reservation under the treaty of March 6, 1865, and the provisions of the Act of Congress of August 7, 1882, and is upon the reservation without authority.

It will be observed from the foregoing that this office as well as the Omaha tribe, takes the ground that none of the half breeds or mixed blood Omahas, living at the date of the treaty of 1865, who were not residing with the Omahas at that time, nor the decendants of such, are entitled to allotments on the Omaha

reservation by reason of their relationship to the Omahas.

It appears from the records of this office, that there were some seventy half-breed Omahas who received patents for lands on the Great Nemaha reservation, and it is very important that the question of their rights or the rights of their decendents to the land on the present Omaha reservation be determined.

A decision in the present case will settle the whole question. If you concur in the opinion above expressed, I have the honor to request authority to remove the said Peters and all others of a like class from the reservation.

Very respectfully,

JOHN H. OBERLY,
Commissioner."

The report of the Commissioner of Indian Affairs was approved by the Secretary of the Interior under date of December 5, 1888, and the Commissioner of Indian Affairs was authorized to remove Frank A. Peters from the reservation and all other persons who might be thereon under a similar state of facts, and which said order and judgment is as follows: (Rec., p. 155).

DEPARTMENT OF THE INTERIOR,
WASHINGTON, Dec. 5, 1888.

The Commissioner of Indian Affairs:

SIR:—I have considered your report of the 14th instant, upon a petition filed by the Indians of the Omaha Reservation, in Nebraska, relative to one Frank Peters, whom the petitioners claim belongs to one of the mixed blood families who were provided with land by them on the Nemaha reservation, and who were excluded by them in their treaty of 1865.

from taking land on the Omaha reservation and who now have settled contrary to their wishes on their unallotted lands on the Omaha Reservation.

It is stated in your report that the said Frank Peters, though a mixed blood Omaha, is not adopted by the tribe on the Omaha Reservation; that he was not residing with the Omaha's when the treaty of March 6, 1865, (14 Stats., 668) was made, (the 4th Article of which extended the benefits conferred thereby in respect to allotments, to such only of their half or mixed blood relatives as were residing with them at the date of the treaty); that his name is not borne upon the duly certified roll of 1871, submitted by the Omaha Council, which is represented to contain the names of all Indians or mixed bloods entitled to lands on the Omaha Reservation, which was approved by the Department January 26, 1871; that upon the passage of the Act of August 7, 1882, (22 Stats., 341) providing for the sale of a portion of the Omaha Reservation, and the allotments of lands in severalty to the members of the tribe, a number of mixed bloods from the old Nemaha Reservation, and among them the Peters family came to the Omaha Reservation, in the hope of securing allotments under the new law, and that this was denied them, your office holding that under the said Act of August 7, 1882, none but members of the tribe and their half or mixed blood relations residing with them at the date of the treaty of 1865, whose names are borne upon the duly certified census roll of 1871, or their descendants, and such others as may

have been lawfully admitted into the tribe, would be entitled to receive allotments of land thereunder.

In view of these statements, and your finding that the said Frank Peters is not entitled to allotment of lands on the Omaha Reservation under the treaty of March 6, 1865, and the provisions of the Acts of Congress of August 7, 1882, and is upon the Reservation without authority and contrary to the wishes of the Omaha Indians, you are hereby authorized to remove him and any other persons who may be thereon under a similar state of facts, from the Omaha Reservation.

Very respectfully,

WM. F. VILAS,

Secretary."

Sixth Judgment. Frank A. Peters denied Enrollment and Ordered from Reservation.

In 1890, under date of August 6th, Frank A Peters made an application to the Department for enrollment as a member of the Omaha tribe of Indians, and which was accompanied by communications from Thomas L. Sexton, R. W. Furnas and Hon. C. H. Van Wyck.

Hon. T. J. Morgan, Commissioner of Indian Affairs, denied the application and communicated his ruling thereon to said Sexton under date of August 27, 1890, as follows (rec. pp. 348-9):

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, August 27, 1890

Rev. Thomas L. Sexton, Seward, Neb.,

SIR:—I have received your letter of August

19, 1890, transmitting with favorable mention one from Mr. F. A. Peters, dated Omaha Agency, Nebraska, the 6th instant, claiming to have rights in the Omaha tribe, and asking to be enrolled as a member thereof and given an allotment of land, &c., and enclosing a copy of a communication bearing on the subject, from Robert W. Furnas, Esq., and Hon. C. H. Van Wyck.

In reply I have to say that the allotment of land on the Omaha Reservation was made under the provisions of the Act of Congress approved August 7, 1882 (22 Stats., 341), which expressly stipulates and provides that such allotments shall be deemed and held to be in lieu of 'the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for whom for the most part certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided."

The fourth article of the treaty referred to (14 Stats., 668), extended the benefits conferred thereby, in respect to allotments, to such only of their half or mixed relatives as were *residing with them* at the date of the treaty, the language of the article being 'including their half or mixed blood relatives now residing with them.'

As soon as the Act of August 7, 1882, providing for the sale of a portion of the Omaha Reservation and the allotment of lands in severalty to the members of the tribe became known a number of mixed bloods from the old

Nemaha Reservation came to the Omaha Reservation in the hope of securing allotments under the new law. The Indians of the Omaha Reservation manifested the most determined opposition to such persons being allowed to participate in the distribution of the land. The instructions given by this office to the Special Agent making allotments on the Omaha Reservation, concerning the class of claimants referred to were to the effect that none but members of the Omaha tribe and their half or mixed blood relations residing with them at the date of the treaty of 1865 whose names are borne upon the duly certified census roll of 1871 of the Omahas, which was approved by the Department—showing the names of those who were entitled to selections of land in severalty under the treaty aforesaid, or the descendants of those so enrolled, and such others as might have been lawfully admitted into the tribe, would be entitled to receive allotments of land thereunder.

Under the date of March 19, 1888, sixty-five Indians of the Omaha Reservation addressed a communication to this office protesting against giving an allotment to Mr. Peters who was alleged to belong to one of the mixed blood families, provided with land on the Nemaha reservation by the Omaha tribe by the 10th Article of the treaty of July 15, 1830. (7 Stats., 328.)

This office submitted a report on the subject to the Department under date of November 14, 1888, reciting the foregoing facts and conclusions, and stating that Mr. Peters was not adopted by said tribe, was not residing with

them when the treaty of March 6, 1865, was made, that his name is not borne upon said roll of those entitled to lands upon the Omaha Reserve, that he was upon the Reservation without authority, and recomending that authority be granted for his removal therefrom with all others of a like class.

The Secretary of the Interior, under date of December 5, 1888, granted authority as recommended for the removal of Mr. Peters and all others of a similar class from the Reservation, and on the 15th of that month the Agent at the Omaha and Winnebago Agency was instructed to remove Mr. Peters and the others from the Reservation. The Agent reported April 3, that Mr. Peters refused to remove and he was again instructed May 10, 1889, to remove him, but it appears that this has not been done.

This office does not deem it advisable to take steps with a view to obtaining a reversal of the decision of the Department against Mr. Peters.

Very respectfully,

T. J. MORGAN,

Commissioner."

On the same date, August 27, 1890, the Commissioner directed Indian Agent Robert H. Ashley to require Frank A. Peters and others of a like class to remove from the Reservation. (See letter of August 27, 1890, from Commissioner to Ashley, certified record. Rec., p. 347.)

Pursuant to said directions Indian Agent Robert H. Ashley did, on September 13, 1890, serve written notice on Frank A. Peters, Walter Peters, William Barada and Luke Sailors to remove from the Reservation. (See his letter September 15, 1890. Rec., p. 161.)

Seventh Judgment. Complainants Denied Enrollment.

In January, 1891, a duly accredited delegation of Omaha Indians waited on the Commissioner of Indian Affairs at Washington, and urged the removal of these mixed blood intruders. (See letter January 12, 1891, Commissioner to Secretary of Interior. Rec., p. 163.)

Subsequently, under date January 13, 1891, the Commissioner in his instructions to Robert H. Ashley, Indian Agent, relating to payment of annuities, ordered that said complainants should not be enrolled and should not receive annuities and said: (Rec., pp. 164-5).

> "As you have had a good many per capita payments to Indians to make, I do not think it necessary to instruct you in detail in regard to the general rules to be followed, and the customs and usages which experience has shown to be most advisable, but will enclose with this a copy of a letter, addressed to me, under date of 12th instant, to certain Omaha delegates, who are now in this city, by which you will observe that certain parties therein named who belong to a class of trespassers on the Omaha Reservation, and who are not entitled to lands, or other benefits, under the Act of August 7, 1882, above referred to, are not to be enrolled by you, or allowed any share in the payment you are about to make."

The names of those specially objected to by the delegates are: William Barada, Thomas Sloan, Mrs. Fulton Peters, Frank Peters, Walter Peters and Mrs. Sailor and their

families, and you will not enroll or pay any of them.

* * * * * *

Respectfully,
T. J. MORGAN,
Commissioner."

Eighth Judgment. Complainants' Former Suit in this Court.

The facts relating to the former adjudication in this court are set out in stipulation of facts in Doc. T., No. 174, par. 28, and T. No. 267, par. 37. (Rec., pp. 70-71 and pp. 353-4).

"That Margaret Sloan, Thomas L. Sloan, William Barada, Frank Peters and Walter Peters, becoming advised that they should not be enrolled nor receive annuities, and becoming advised that it was the purpose and intention of the Department to have them forcibly removed from the Reservation as intruders and trespassers thereon, filed a bill in equity in the Circuit Court of the United States, for the District of Nebraska, wherein Robert H. Ashley, U. S. Indian Agent, Henry Fontenelle, Wa-gae-pa, otherwise known as Ezra Fremont, Wa-han-ga, John Springer, Nebraska, and twelve hundred others, being members of the Omaha tribe of Indians, were made defendants, and in which suit said complainants claim to be members of the Omaha tribe of Indians, and to be entitled to allotments of land, and to receive annuities, and upon the filing of said bill on the 30th of January, 1891, obtained a writ of injunction enjoining Robert H. Ashley, U. S. Indian Agent, from forcibly removing the complainants therein from the

Omaha Reservation; that in said case the defendants in said suit filed answer, and proofs were taken, and subsequently, on the 25th day of April, 1893, a decree of dismissal was entered in said cause as follows:

Bill dismissed Plffs. for cost.

"It is held that the President is authorized to make such disposition of money and property as he may think advisable for the benefits of the Omaha Indians, and that his authority to do so cannot be restricted by injunction; and on that ground, and for these reasons, the bill is dismissed.

(Signed)
ELMER S. DUNDY,
Judge.

(Journal "R," page 425.)

In which said judgment and decree was not appealed from, but remained in full force and effect."

Ninth Judgment. Adoption of Sloans into Indian Tribe Denied.

All other remedies having failed, and the Interior Department having frequently ruled that the Sloans and others were not entitled to receive annuities or to have allotment of lands on the Omaha Reservation, Margaret Sloan and Thomas L. Sloan endeavored to have themselves adopted into the Omaha tribe of Indians, and to that end procured petitions to be signed by a considerable number of the members of the Omaha tribe of Indians, requesting that their names should be placed upon the rolls as members of the tribe.

To these petitions a vigorous protest was made by certain members of the tribe, who asserted, among

other things, that Thomas L. Sloan was seeking to secure by adoption into the tribe, what he had failed to secure before the Department and in the courts, and that no reason could be given for his adoption into the tribe that could not be given with equal force for the adoption of any other white man. (See pp. 18, 19, *supra.*)

The Commissioner of Indian Affairs reported the application for adoption to the Secretary of the Interior, and the Secretary of the Interior found and ruled that the Sloans were not entitled to adoption into the tribe, and in his opinion under date of September 6, 1894, said:

(Rec. pp. 156-8).

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, September 6, 1894.

Commissioner of Indian Affairs:

SIR:—I have received your letter of the 10th of July last, transmitting one from Captain Wm. H. Beck, U. S. A., Acting Indian Agent at the Omaha and Winnebago Agency, Neb., with enclosures of six petitions by Omaha Indians asking that the names of Mrs. Margaret Sloan and Thomas L. Sloan be placed upon the rolls as members of that tribe—these petitions bearing the names of some one hundred and sixty persons, including those of nine of the eleven members of the tribal council. The acting agent states that these petitions were made after due deliberation in several open councils, in which the claims of the Sloans were presented, discussed, and decided upon, with the result that the council and many other members of the tribe desire the adoption of the persons named, and that the sig-

ners took such action, believing that Thomas L. Sloan would be of benefit to them in the near future, as he would identify himself with the tribe, and from his ability and character, and knowledge of the tribe, be able to aid them in handling their lands. He further adds that the Omahas are divided into factions, and refers to one led by Henry Fontenelle and Silas Wood, ex-interpreter, who obtained a petition many months ago secretly and forwarded it to the Department, representing that the Omahas did not desire Mr. Sloan to become a member of the tribe, which petition, the Agent says, was signed largely without the authority of the signers.

This latter petition contained about ninety-five names, and anticipated the action of the members of the council and other Indians of the tribe in the matter of adopting the Sloans as members, and embraced a statement or argument against the adoption of the said parties into the tribe; among other things, that about three years ago Thomas L. Sloan, having met with no success before the Department with his claim, resorted to the U. S. Courts, and the tribe was asked to show cause why Sloan and many other part-blood Omahas should not share in the annuities and lands of that tribe; that the oldest and best informed Indians of the tribe gave their testimony in that case, which cost the tribe nearly $3,000, with the result that the U. S. Court, like the Department, decided the case against Sloan and his co-petitioners, and that he is now seeking to gain by adoption into the tribe what he failed to secure before the Department and the

U. S. Court; further, that it is not the wish of the tribe to have Sloan become a member of it, and adds that without stopping to say how many reasons there are why Mr. Sloan should not be admitted, they do say there is no reason for his adoption that could not be given for the adoption of any other white man.

You say that the claims of Mrs. Sloan and Thomas L. Sloan, her grandson, to recognition as Omaha Indians, and their right to participate in the use and enjoyment of the tribal properties, have been frequently before your office during the past eleven years, either independently or in connection with the claims of other Omaha half-breed claimants whose status is similar to that of the Sloans, and refer to a report of Miss Alice C. Fletcher of April 28, 1884, who was then making allotments to the Omahas, in which she stated that Mrs. Sloan (who was the daughter of an Omaha woman and Michael Barada, a white man, and who holds an allotment on the Nemaha Reserve as an Omaha half breed) never lived upon the Omaha Reservation until in 1857, when her husband, Thomas Sloan, a white man, was appointed to take charge of the mill then being built on that reservation, where he remained in government employ for two or three years, which period constitutes her only residence there up to 1881, when she returned thereto with her grandson, Thomas L., the only child of her deceased son, William; that Mrs. Sloan and her grandson claimed the right to allotments on the Omaha Reserve under the act of August 7, 1882, although section 5 of that act provided that such allotments shall be

in lieu of those provided for in the fourth Article of the treaty of March 6, 1865, with the Omahas, which said article provided for allotments in severalty to the Omaha Indians, 'including their half or mixed blood relations now (then) residing with them;' that the schedule of selections of land in severalty under the said fourth article, duly certified by the chiefs of the Omaha tribe, and certified and submitted by their agent to your office on December 30, 1870, which was approved by the Department on January 26, 1871, embrace neither the name of Mrs. Sloan nor of her descendants; that her claims were fully investigated in an open council of the tribe, and that the tribe does not in any way admit Mrs. Sloan's claim to land, and you say that Miss Fletcher accordingly decided that Mrs. Sloan and her descendants are not legally entitled to allotments under the said act of August 7, 1882, and that her decision was sustained by your office on May 9, 1884.

After reciting other facts in relation to the claims of the persons herein referred to, and the general status of the Omaha half-breed question at this time, and the opinions and decisions of your office and the Department in these cases, which opinions and decisions have been uniformly adverse to the mixed-bloods, you state that your office knows of no reason either for changing such decision or for making an exception of the case now before it, and submit the question of the adoption of Mrs. Margaret Sloan and Thomas L. Sloan as members of the Omaha tribe of Indians, with all the rights and privileges appertaining thereto,

for the consideration and decision of the Department.

The status of these claimants seems to be that they have failed to establish any rights to recognition as members of the Omaha tribe and that they now seek to establish such rights through the petitions presented with your letter, which contain the names of certain members of that tribe, who apparently assent to their adoption, with all the rights and privileges as such members.

Aside from the general proposition that the question of adopting the Sloans as members of the tribe is one in a measure separate and distinct from their alleged rights as Omaha Indians by blood, and that such alleged right is not necessarily a test for such adoption, there remains the right to admission by the free will and consent of the tribe, if fairly and properly obtained.

Upon their faces, the several petitions presented with your letter seem to be in proper form and to express the desire of a majority of the members of the tribe that the persons in question shall be placed upon the rolls of the tribe, and be admitted to all the rights and privileges of the other members thereof.

Besides the opposing petition heretofore referred to, the Department is in receipt of recent information which shows that of the one hundred and fifty-seven persons whose names appear on the six petitions presented with your letter, only seventy now favor the claimants; that eleven others has since assented to their adoption, making eighty-one in all now favorable; that twenty-four of the signatures thereon

were not written by the parties whose names are given, nor was the use of their names authorized by them; that fifteen names were signed twice, and that the said petitions bear the names of nine boys and three women neither of whom have any voice in such matters; that one of the nine members of the council purporting to have signed one of the petitions, did not sign nor authorize the use of his name, and, further, that there are one hundred and eighteen male members of the tribe, of lawful age, who oppose the adoption of the Sloans.

Without expressing any opinion of the merits of the petitions in question, the facts presented seem to clearly establish the belief that it is the desire and wish of a majority of the members of the tribe that the Sloans be not admitted to membership and it is so ordered.

In reference to that part of your report wherein you state that Thomas L. Sloan has held and improved a tract of land since 1881 or 1882, on the Omaha Reservation, it would seem that he is doing so in defiance of any legal authority of occupation.

The enclosures of your letter are returned herewith.

Very respectfully,

WM. H. SIMS,

Acting Secretary.

Subsequently the Sloans applied to the Commissioner for a re-hearing, appealed to the Secretary of the Interior, who denied the re-hearing and affirmed the former ruling, as is set out in the following opinion and judgment. (Rec., pp. 165-8).

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, November 17, 1896.

Commissioner of Indian Affairs:

SIR: I am in receipt of your letter of the 10th instant, with its enclosures, reporting upon the cases of Mrs. Margaret Sloan and Thomas L. Sloan, applicants for admission to membership with the Omaha tribe of Indians, presented by their attorney, Mr. Ralph W. Breckenridge, of Omaha, Nebraska, who appeals by letter dated October 1st, last, from the conclusions reached by your office on September 28th, last, in declining to reconsider the cases of the persons named.

This case was before the Department, with your letter of July 10, 1894. After due consideration of all the facts then presented, the Department decided adversely to the claimants, for the reasons set out in its letter to your office, dated September 6, 1894.

No evidence of fact or law is now presented that was not then known to and considered by the Department.

The only facts now offered that can be considered in the light of new evidence, is the 'decision of the Spencer case,' tried May 16, 1896, in the United States Court for Nebraska, on behalf of the Government, to recover an amount improperly disbursed.

Mr. John T. Spencer was appointed by the Department in 1890 to make a payment of certain moneys to the Omahas.

When his accounts were received and examined by your office, it was found that he had enrolled and paid annuities to Margaret

and Thomas L. Sloan (the present claimants) as members of the Omaha tribe.

Having no authority to enroll or pay annuities to these persons, and making no satisfactory explanation of the reasons for his action, exceptions to his accounts were noted, and suit brought against his bond for the recovery of the amounts so paid, with the result that the jury found in favor of the defendant.

The testimony in the case, which is quite lengthy, clearly discloses the probability that the attorney who represented the Government was not in possession of the decision of the Department against the Sloans and other mixed-bloods of a like class, or the reasons therefore, nor that he was aware of their true status. It also discloses that important evidence was withheld from the jury that in all probability would, had it been properly placed before the court, have resulted in a different charge to the jury and a different verdict by that body.

Instead, it appears that the jury were led to believe that the objections of the Department to admitting these people to share with the Omahas must be found either in a misapprehension of their lineage, 'or else in the caprice of some subordinate of the Department.' (*Vide* brief of Mr. Breckenridge, p. 10.)

The question of the tribal rights of these persons was not before the Court. The issue was whether they were properly enrolled by Mr. Spencer.

The last instruction of the Court to the jury was, as follows:

'To charge Spencer with payments that

were made to parties who were not members of the tribe; it must appear they were not members of the tribe and not entitled to share, and he had no good and reasonable ground to believe they were not members of the tribe at the time he made the payments to them.'

No evidence was offered by the prosecution to show that these persons were not legal members of the tribe, although it was within the knowlede of at least one of the Government's witnesses, who had been officially informed of the status of the case, and *why* the Department refused to authorize the enrollment of the Sloans with the Omahas, and nowhere in the record of the testimony before the Court in the case are the reasons shown *why*, and upon what legal grounds the Department declined allotments to the claimants.

Hence the favorable verdict of the jury for the defendant.

Mrs. Margaret Sloan received an allotment of three hundred and twenty acres of land, as a half-breed Omaha Indian, under the provisions of article ten of the treaty of July 15, 1830, with the Omahas and other tribes, (7 Statutes, 328-330)—provision being made therein that the parties to the treaty 'might be permitted to make some provision for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits,' etc.

This tract of country was known as the Nemaha (half-breed) reserve.

Patent No. 128 for her allotment therein was issued to Margaret Sloan September 10, 1860, under the provisions of Section 5 (4) of an

Act of Congress approved July 31, 1854, (10 Statutes, 332) which directed that the stipulations of the tenth article of the treaty of 1830 be fulfilled by causing the reserved tracts to be surveyed and allotted to the persons entitled thereto.

About the same time her son, William E., the father of Thomas L., one of the claimants, who is the grandson of Margaret, received an allotment (No. 274) of three hundred and twenty acres on the Nemaha reserve, for which a patent was subsequently issued to him.

Thomas L. was born in St. Louis in 1863, and lived on the Nemaha reserve with his grandmother for some time in the 70's until 1880, when they went to the present Omaha reservation.

It is not denied, nor has it ever been that the Sloans, mother and son, are of part Omaha Indian blood. The tribe recognized them as such and made provision for them, with others, by the treaty of 1830, and in the opinion of the Department, and the Omahas themselves, their claims as such mixed-bloods were extinguished by the lands given them under the terms of the tenth article of the treaty named.

As showing that the Omahas so regarded this provision, they provided in their treaty on March 6, 1865 (14 Stat., 667, Article 4), that allotments of land in their reservation in Nebraska should be given to their 'half or mixed-blood relatives *now residing* with them,' and when many of the mixed-bloods from the Nemaha reserve went to the Omaha reservation to secure more land, after the passage of the act August 7, 1882, (22 Statutes, 341), which provided for the sale of a part of the latter re-

servation and allotment of land in severalty, the Omahas strenuously objected and called upon the Department to remove these half-breeds from their reservation. They so objected to the Sloans.

The claims of Margaret and her son William E. were extinguished prior to the birth of Thomas L.

It is nowhere alleged or claimed that the latter is the offspring of a mother having Indian blood, much more of one of Omaha blood. The presumption is, therefore, that his mother was a white woman.

The claims of Margaret and Thomas L. are based upon their birthright as Omaha Indians and upon their alleged adoption in recent years by the tribe.

The birthright claim of Margaret has been extinguished. Thomas L. never had such claim. Neither of them have any claim by adoption, never having been regularly, fairly, or properly adopted by the tribe, as was shown by Department letter of September 6, 1894.

Notwithstanding that Mr. Breckenridge has advised the Department by letter, dated the 30th ultimo., of his withdrawal as attorney for the claimants, I have caused this review of the case to be made, and adhere to the opinion expressed in Department letter of September 6, 1894, that the persons named have no valid legal claims to membership with the Omaha tribe of Indians.

The papers transmitted with your letter are returned herewith.

Very respectfully,

D. R. FRANCIS,

Secretary."

It will be noted the foregoing proceedings were had by the Sloans after the act of 1894 conferring jurisdiction upon the United States Circuit Courts in such cases.

Tenth Judgment. Artemesia Frost Denied Membership into the Tribe.

Artemesia Frost, who was a daughter of Margaret Sloan and sister to William E. Sloan (the father of Thomas L. Sloan), and who is the mother of the complaints, Philemon H. Frost, Sarah F. McCreary, Charles Frost, and Leonard Frost, (rec. p. 65) made an application to the Interior Department by petition and in person, to be admitted into membership with the Omaha tribe of Indians. The said application was considered by the Commissioner of Indian Affairs and the facts by him reported to the Secretary of the Interior, under date of June 16, 1897, and afterwards on the 21st day of June, 1897, the Secretary of the Interior adjudged and determined that Artemesia Frost was not entitled to be admitted into membership with the Omaha tribe of Indians, and which said judgment and ruling is as follows: (Rec. pp. 168-9.)

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 21, 1897.

The Commissioner of Indian Affairs.

SIR:—I am in receipt of your letter of 16th instant, transmitting for Departmental consideration certain papers in the case of Artemesia Frost, a quarter blood Omaha woman, who applies by petition and in person (being present in the city) for membership in the tribe named, with all the benefits, rights, and privileges pertaining thereto.

Among the papers submitted are letters

from Senators Allen and Thurston of Nebraska, the former of whom asks that a patient hearing be given Mrs. Frost's case, and the latter that her case be reconsidered and sent for further investigation to Lieut. W. A. Mercer, U. S. A., the newly detailed agent at the Omaha and Winnebago Agency, Nebraska, on the ground that great favoritism has been shown by the late agent, Captain William H. Beck.

Mrs. Frost is the daughter of Margaret Sloan, a mixed blood Omaha woman whose case was decided adversely by the Department on November 17, 1896, on the ground that her "birthright' claim had been extinguished under the provisions of Article X (10) of the treaty of July 15, 1830, with the Omaha and other tribes (7 Statutes, 328-330.)

Mrs. Frost's claim is an exact counterpart of that of her mother, who also claimed recognition as a member of the tribe, with the right to participate in the tribal annunities, etc., and to receive an allotment of land.

An examination of Mrs. Sloan's case shows that she received an allotment of three hundred and twenty acres of land, as a half-breed Omaha, under the provisions of the treaty of 1830, in the track of country known as the 'Nemaha Reserve,' especially set apart by the said treaty for the purpose of bestowing upon their half-breed relations some provision for their support.

There is nothing in the papers in Mrs. Frost's case to show that she was an allotte in the Nemaha reserve, although it is stated in your letter that she orally admitted having re-

ceived lands in that reserve. She has also stated to the Department, in the course of an interview in regard to her case, that she received an allotment in the said reserve as an Omaha half-breed. Her rights therefore, seem to have been recognized and she seems also to have been compensated in the manner provided by the treaty in cases of that character.

As showing that the Omahas regarded that the claims of such mixed bloods were extinguished by the lands given them under the provisions of the treaty cited, the following provision was made in Article Four (4) of the treaty with them of March 6, 1865, (14 Statutes, 667-668.)

The Omaha Indians being desirous of promoting settled habits of industry and enterprise among themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, *including their half or mixed-blood relatives now residing with them.* * * *

When many of the mixed-bloods from the Nemaha Reserve went to the new reservation to acquire more land, after the passage of the Act of August 7, 1882 (22 Statutes, 341), which provided for the sale of a portion of the latter reservation and allotment of land in severalty, the Omahas strenuously objected and called upon the Department to remove these half-breeds from their reservation.

By her own admission, Mrs. Frost's birthright claim has been extinguished. To admit her present claim would be an injustice to those of the tribe who have never received al-

lotments and who alone are entitled to participate in the division of the lands in the diminished reserve; would also be against public policy and a violation of the rules and regulations of the Department, which prohibit more than one allotment to an Indian, for any reason whatever.

The papers in the case are herewith returned.

Very respectfully,

C. N. BLISS,
Secretary."

VI

The Act of 1894, as Amended in 1901, Does Not Confer Upon the Circuit Court Jurisdiction to Review or Vacate the Judgments Rendered by the Interior Department Against the Mixed Blood Complainants Set Out in the Preceding Chapter of this Brief. The Jurisdiction of said Court is Confined to An Inquiry as to Whether the Complainants Are Entitled to an Allotment of a Particular Parcel of Land Which they May Lay Claim to, as Against the Claim of Any Other Person to an allotment of the Same Particular Land.

The present suits are brought on the theory that the court has jurisdiction to overturn the rulings and judgments of the Interior Department before recited in this brief, and to determine and adjudge the complainants to be members of the Omaha tribe of Indians, and, as such members, entitled to receive annuities and allotments of lands under the act of 1882.

The Interior Department has adjudged and determined the following facts and conclusions:

a. The complainants were not members of the

Omaha tribe of Indians in 1865, and were not entitled to annuities or to allotment of lands under Article 4 of the treaty of 1865.

b. The complainants were not mixed blood relatives residing with the Omaha tribe of Indians in 1865.

c. The complainants were not persons who had received assignments or certificates of assignments of lands under the treaty of 1865, and not persons who were entitled to have or receive such certificates under the treaty of 1865, as referred to and described in section 5 of the act of 1882.

d. That the complainants were not members of the Omaha tribe of Indians when the act of 1882 became a law, and were not persons who were authorized to participate in the open council of the Omaha tribe of Indians in 1882.

e. That the complainants were not even residing upon the reservation in 1882, but that they subsequently came to the reservation with the purpose and intent to wrongfully obtain an allotment of land to which they were not entitled.

f. That the Omaha tribe of Indians constantly and persistently protested against the complainants receiving an allotment of lands and against their claim to membership in the tribe.

g. The Department has frequently and continuously ruled during the last twenty years that the complainants were not members of the Omaha tribe of Indians, and that their presence on the reservation was that of intruders and trespassers.

h. That some of the complainants eventually endeavored to have themselves adopted into the tribe,

but which adoption was denied by a majority of the tribe and refused by the Interior Department.

Our point of contention is that no one of the preceding questions is subject to review by the court.

The above questions were adjudicated by the Interior Department prior to the act of 1901 and prior to the beginning of these suits. It certainly was not the intention of the law that the court shall assume the function which belonged to the Interior Department, and to overturn its judgments and findings. Neither was it the intention of the law that the court should sit as a court of review over the judgments and rulings of the Interior Department. The Department of the Interior had plenary power given it under the act of Congress to pass judgment upon all the questions above set down, and has full and complete jurisdiction over Indian Affairs. That was so when the law of 1901 was passed, and had been so from the beginning of the Government.

If Congress had intended by the act of 1901 to take from the Departmeat of the Interior the above mentioned powers, and to confer them upon the courts by the act of 1901, it would have said so in explicit terms. We all know that the powers of the Interior Department are as full, complete and comprehensive over Indian affairs since the act of 1901, as they were prior to that date. We all know that the Interior Department is daily engaged in the exercise of those powers.

Would any one contend that the Sloans could apply to the Interior Department for admission to membership with the Omaha tribe of Indians, and after hearing the Interior Department should deny their right to membership, that they would have a right to

bring an action in the courts to establish their membership?

Suppose the rights of the complainants to allotments was dependent upon the question whether they were residents upon the reservation or members of the Omaha tribe of Indians when the law of 1882 was passed, and the complainants had submitted that question to the Interior Department, would any one contend that they could file a bill in the courts to have the same again re-adjudicated? So I might go on with like queries relating to every question of law, and fact which has been adjudged by the Interior Department against these claimants. To hold otherwise would be to give the act of 1901 a retroactive effect in violation of the well settled rule of law.

In *Atoka Coal & Mining Co. v. Adams*, 104, Fed., 471, Judge Caldwell, speaking for the Circuit Court of Appeals, said:

> "The function of the Legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While in the absence of a constitutional inhibition, the Legislature may give to some of its acts a retrospective operation, *the intention to do so must be clearly expressed, or necessarily implied from what is expressed.*"

Judge Cooley in *Constitutional Limitations*, says, p. 456:

> "It is a sound rule of construction that a statute should have a *prospective operation only*, unless its terms show clearly a legislative intention that it should operate retrospectively."

If the Circuit court can review or overturn the judgments of the Interior Department which have been

heretofore rendered, it might lead to disastrous consequences as it might overturn the established practice and precedents of the Department, and unsettle principles and precedents which had long been established.

It is settled law that the Secretary of the Interior cannot reverse the judgments rendered by his predecessor, and that the judgments of an incumbent of that office are final and conclusive upon his successor. *Noble v. Union River Railway Company*, 147 U. S., 176; *Emblam v. Lincoln Land Company*, 94 Fed., 714; *United States v. Stone*, 2 Wall., 525, 535. For the same reasons the judgments of the Interior Department should be final and conclusive upon the courts to the like extent.

The converse of the proposition must equally be true, to-wit: That when the Circuit Court shall enter its judgment in a matter over which it has jurisdiction, the Interior Department would be without authority to review or reverse the judgment of said court. The act provides that the judgment of said court when properly certified by the Secretary of the Interior shall have the same effect as if such allotment had been allowed and approved by him. In other words, the judgment of this court would have the full force and effect of a like judgment entered by the Secretary of the Interior to an allotment of a particular piece of land, but it has no greater force or effect. Yet, we do not think any one would contend that the Secretary of the Interior could reverse or review or vacate the findings and decrees that might be rendered by this court in the pending cases. Likewise the Circuit Court does not have authority or jurisdiction to reverse the judgments heretofore rendered by the Secretary of the Interior.

The Jurisdiction of the Circuit Court is Limited to an Inquiry into the Complainant's Right to an Allotment to a Particular Parcel of Land.

And it has no jurisdiction as to tribal rights or tribal questions or to any question relating to Indian affairs over which jurisdiction is conferred on the Interior Department.

The act reads:

> "That all persons who are in whole or in part of Indian blood * * * who claim to have been unlawfully denied or excluded from *any* allotment or any parcel of land to which they claim to be lawfully entitled by virtue of an act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to *their right thereto* in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action * * involving the right of any person * * to any allotment of land under any law or treaty * * and the judgment or decree * * shall have the same effect when properly certified to the Secretary of the Interior as if *such allotment* had been allowed and approved by him."

It will be observed that the language of the act contemplates a proceeding in the Circuit Court *only* when the plaintiff makes claim to a particular allotment or parcel of land. In other words, the jurisdiction conferred upon the Circuit Court is to decide whether the complainant is entitled to a particular parcel of land by way of allotment. This is made more clear by the latter part of the clause which provides that the decree shall have the same effect as if such allotment

had been allowed and approved by the Secretary of the Interior.

It has long been a settled rule of law that a claimant to the public lands could not maintain a suit in the courts to recover the same so long as the title remains in the United States. But the courts have exercised jurisdiction between the claimant to a particular piece of land and the person to whom the lands were in fact patented by the United States in proper cases, to-wit: Where it is clear that the officers have "by a mistake of law given to one man the land which on the undisputed facts belong to another." *Moore v. Robbin*, 96 U. S., 530.

On this point Judge Shiras said (*Sloan v. United States*, 95 Fed., 193, 194, 195):

> "In the exercise of the jurisdiction to give relief within the limits thus defined, courts will not take cognizance of a controversy over the title to particular premises, so long as the title thereto remains in the United States, but will only do so after the title has vested in a private party. *Gaines v. Thompson*, 7 Wall., 347; *Secretary v. McGranahan*, 9 Wall., 298; *Litchfield v. Richards*, Id., 575; *Marquez v. Frisbie*, 101 U. S., 473."

> It was doubtless the existence of this recognized and well-established rule, with respect to the public lands generally, that led to the adoption by Congress of the act of August 15, 1894, (28 Stat., 305). A refusal on the part of the land department to make an allotment of a particular tract or of a specified number of acres out of the reservation to a claimant would leave the title in the United States, and under the general rule, as laid down in the

cases above cited, courts would refuse to exercise jurisdiction on behalf of the party claiming an allotment, so long as the title remained in the government. To remedy this difficulty, the act of August 15, 1894 (28 Stat., 305), was adopted, which creates a special jurisdiction in the courts, evidently intended to enable the courts to deal with the legal questions involved, and to settle the rights of parties seeking allotments in severalty, although the title to the lands remains in the United States. Under the recognized rule applicable to the public lands of the United States, the courts would not take jurisdiction over contested rights thereto until, by action of the land department, the title had been vested in a private party; but under the act of August 15, 1894 (28 Stat., 305), the jurisdiction, in cases coming within the purview of the act, may be exercised while the title remains in the United States."

What was said by Judge Shiras in the above quotation apparently limits the jurisdiction of the court within the line of inquiry we are insisting upon. Applying the above rule of construction to the present suits, the questions to be considered are reduced to these: If the claimants assert rights to particular parcels of land which have been allotted and patented to other persons, the court would have jurisdiction to adjudicate upon the respective claims thereto, in like manner and under like circumstances that would warrant the exercise of like jurisdiction under the land laws of the United States. It may be that the effect of the act of 1901 is to confer the right upon the courts in Indian allotment cases *before* the title passes from United States. Be this so, nevertheless, the jurisdic-

tion of the courts is limited to an inquiry as to the right of a complainant to a particular parcel of land. But it is apparent that the line of inquiry above indicated is entirely distinct from and different from the inquiries and matters and things which were adjudged and determined by the Interior Department against those complainants. Wherefore, the matters and things which were adjudged and determined by the Interior Department are not subject to review or reinvestigation by this tribunal in these proceedings.

But it is equally true that the questions of law *and fact which have been adjudged and determined preclude the rights of the complainants to any allotment of land whatsoever.*

The court in the present case cannot decide that the complainants are entitled to have allotted to them particular lands, which they lay claim to in the pleadings, without reversing judgments of the Interior Department on the many questions heretofore determined by it.

The judgments of the Interior Department heretofore referred to necessarily involved *a finding of matters of fact*, and also of mixed questions of law and fact, and are conclusive and unassailable in a proceeding of this character. *Smelting Co. v. Kempt*, 104 U. S., 636 640; *Marquez vs. Frisbie*, 101 U. S., 473; *Noble vs. Union River Logging Ry. Co.*, 147 U. S., 175; *United States v. Winona, etc., R. R. Co.*, 32 U. S. App., 272.

VII

The Act of August 7, 1882, Only Contemplated Allotments of Lands to Members of the Omaha Tribe of Indians Then Residing on the Reservation, and Their Descendants.

From pages 25 to 30 of this brief *supra*, I stated in outline several reasons based upon the language used in different sections of the Act of August 7, 1882, which seem to me to lead irresistibly to the conclusion that the said act was in the nature of a compact between the United States and the "Omaha tribe of Indians" in their tribal capacity; and that the enforcement and fulfillment of the said act was dependent upon the acceptance of said act by the "Omaha tribe of Indians," expressed in open council; wherefore, it necessarily followed that no person could be a beneficiary under said act unless he or she was *then* a member of the "Omaha tribe of Indians," and *then and there* entitled to take part in the councils of said tribe. (In support of the above we refer back to our argument on this point, pp. 25-30.) The rulings of the Department of the Interior have at all times been upon the line of thought above suggested, in the heading of this paragraph.

Commissioner Price, in his ruling in the Kuhn case, under date of September 13, 1883, has said (rec. p. 139):

> "It would be absurd to contend that the treaty or the more recent Act of Congress, under which the allotments are being made, were intended as a general invitation to all persons everywhere, who by hook or crook might be

able to prove the existence of a drop or two of Omaha blood in their veins, to come forward and receive an allotment. Manifestly, such was not the intention.

Commissioner Price, in his instructions to Wilkinson, Indian Agent, under date of October 5, 1883, said: (Rec., p. 141).

> "It would be absurd to contend that the treaty of 1865, or the more recent act of Congress, under which the allotments are being made, were intended as a general invitation to all persons everywhere who might be able to prove the existence of a drop or more of Indian blood in their veins, to repair to the Reservation and select an allotment. Manifestly, such was not the intention, nor will any such construction be admitted in making the allotments."

What was said by Commissioner Price is supported by another consideration, to-wit: the fact that while the allotments were being made in 1883-4 the "Omaha tribe of Indians" vigorously protested against allotments to the non-resident mixed bloods, and from which fact Commissioner Price stated that it was evident that the tribe would not have consented to the act of 1882 if its scope and purpose had been to permit the non-resident mixed bloods to have a share of their lands. The rule of law is that the Indian treaties and compacts are to be construed in favor of the tribe, Upon this point the Commissioner said, September 13, 1883:

> "Besides the recent action of the Indians in forbidding Mrs. Kuhn and others to remain on the Reservation, shows that they never would have consented to any such disposition of their

lands, and it is plain from the language of the act that it was not the purpose of Congress to do anything contrary to the wishes of the Indians."

The construction of the act of 1882 as set down by Commissioner Price in his ruling in the Kuhn case and in the Peters case, was adhered to and followed by his successors. On November 14, 1888, Commissioner John H. Oberly, in a report to the Secretary of the Interior, quoted the rulings of Commissioner Price with approval, and added that the Indian office as well as the Omaha tribe take the ground "that none of the half-breeds or mixed blood Omahas, living at the date of the treaty of 1865, who were not residing with the Omahas at that time, nor the descendants of such, are entitled to allotments on the Omaha Reservation by reason of their relationship to the Omahas." (Rec., p. 154.)

Hon. Wm. F. Vilas, Secretary of the Interior, under date of December 5, 1888, approved the report of Commissioner Oberly and authorized the Commissioner to remove Frank Peters and all other persons from the Reservation who were thereon under a similar state of facts. In the summary of facts stated by the Secretary, is this paragraph: (Rec., p. 155.)

"That upon the passage of the act of August 7, 1882, providing for the sale of a portion of the Omaha Reservation, and the allotments of lands in severalty to the members of the tribe, a number of mixed-bloods from the Nemaha Reservation, and among them the Peters family, came to the Omaha Reservation in the hope of securing allotments under the new law, and that this was denied them, your office

holding that under said act of August 7, 1882, none but members of the tribe and their half or mixed-blood relations residing with them at the date of the treaty of 1865, whose names are born upon the duly certified census roll of 1871, or their descendants, and such others as may have been lawfully admitted into the tribe, would be entitled to receive allotments thereunder."

Commissioner Morgan in his communication under date of August 27, 1890, uses almost identically the same language as that quoted *supra* from the report of the Secretary of the Interior and as contained in the report of Commissioner Oberly referred to *supra*. (Rec., p. 159).

On March 2, 1889, an act of Congress was passed dividing a portion of the Sioux Reservation into separate reservations, etc., which contained a clause similar to that in the act of 1882, making it dependent for its validity upon the consent of the Indians. Hon. Richard Olney, Attorney General, under date of February 9, 1894, in an opinion to the Secretary of the Interior said of the said act of 1889: (20 Op. Atty. Gen'l. p. 712.)

"It will be noticed that the act under consideration was dependent for its validity upon the consent of the Indians. (Sec. 28.) In other words, it was substantially a treaty with the Sioux Nation; acts in this form having taken the place of the ancient Indian treaty since the latter was prohibited by act of Congress in 1871. By the agreement confirmed in this act the Sioux Nation gave up a large amount of territory, and the rights conferred on the nation or on individuals were in consideration there-

of. The persons entitled to such rights are the persons who at the time of the agreement constituted the Sioux Nation and were lawful members thereof."

If the construction put upon the act of 1882 by the Interior Department is not correct or not to be adhered to, disastrous consequences and confusion would be the inevitable result.

The moment it be conceived that membership in the tribe was not a prerequisite essential to the receiving of an allotment, then any person claiming to be a mixed blood could wantonly go upon the land, make an ostensible selection, occupy and cultivate it, without let or hindrance; if membership in the tribe was non-essential, then what right would the tribe have to protest. If membership be non-essential, then *any* full blood white man might squat upon the Reservation and make claim to an allotment of lands.

By such a loose construction of the statute all of the land on the Reservation not actually occupied by the members of the tribe, might be located upon and occupied by intruders and trespassers. This would be an outrage upon the tribal rights, and the tribe would be practically without remedy. It may be suggested that the government might eject these trespassers. This record contains a complete answer to such suggestion.

The Sloan family, the Peters family, the Frost family, the Barada family, the Kuhn family and others of a like class, have been petitioned against by the Omaha Indians. The Commissioner of Indian Affairs more than once ordered their removal; the Secretary of the Interior ordered their removal; the Indian Agent served notice upon them to remove; and finally some

of them were forcibly ejected, but within a few days they returned. This controversy between the tribe and these claimants has now gone on for 18 years, and it never will be ended until they are removed from the Reservation by a process issued from the court.

It is equally essential to the security of the rights of the Omaha tribe of Indians to enforce rigidly the construction of the act of 1882, that none shall be recognized as beneficiaries under the act unless they were *members* of the tribe when the act was passed. *The United States was dealing with the tribe and the membership thereof as it then existed.* The act contemplated a compact with the Omaha tribe of Indians as it *then* existed. It dealt with the tribe of Indians as it *then* existed. From the nature of things it could not be otherwise. It was not a past membership nor a future membership, any more than it was a past tribe or a future tribe, that was to give its "consent" in "open council" to the enforcement and fulfillment of said act.

It will be conceded that none of the complainants were recognized by the Omaha tribe of Indians as members thereof in the year 1882. None of them were participating with the tribe as members thereof in 1882. None of them were living upon the reservation in 1882,—with the exception of Margaret Sloan and Thomas L. Sloan—(who came there in 1881, but their membership was denied); their tribal claims were denied by the tribe and by the United States. They confessed they were not members of the tribe by their endeavor to become adopted into the tribe, and which adoption was also denied by a majority of the tribe and the Interior Department.

VIII

The Act of August 7, 1882, Should Be Construed in Relation to the Provisions of the Treaty of 1830 and the Treaty of 1865.

The Treaty of 1830 Was Not Abrogated by the Act of 1882.

The Act of 1882 Specially Refers to the Treaty of 1865 and the Right to Allotments Therein Provided.

(*a*) The act of March 3, 1871, which provided that thereafter no Indian tribe should be recognized as an independent power, "with whom the United States may contract by treaty," contains the following provision:

> "But no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe, prior to March 3, 1871, shall be hereby invalidated or impaired. (See Revised Stat., Sec. 2079; *Elk v. Wilkins*, 112 U. S., 107.)

Attorney General Olney said (20 Op. Atty. Gen'l, 712):

> "In other words, it was substantially a treaty with the Sioux Nation: acts in this form having taken the place of the ancient Indian treaty since the latter was prohibited by an act of Congress in 1871."

The act of 1882 does not abrogate the treaty of 1830 nor the treaty of 1865 any further than its provisions may be inconsistent with the treaty of 1865. Section 5 of the act of 1882 makes special reference to the treaty of 1865 and provides that the allotments under said act shall be in lieu of the allotments provided for in the treaty of 1865. In section 5 it is provided "which

allotment shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians, to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided."

It will thus be seen that it is necessary to look back to the 4th article of the treaty of 1865 to ascertain who were entitled to allotments or assignments, and to find who were entitled to have or receive certificates of assignments of allotments under said treaty. Article 4 of the treaty of 1865 limited allotments to members of the tribe, "including their half or mixed blood relatives now residing with them."

Thus it was insisted between the United States and the Indian tribe in 1865, that the only persons who were entitled to allotments of lands in severalty were the members of the tribe as it existed in 1865, "including their half or mixed blood relatives now residing with them," and their descendants. The clause relating to the mixed bloods was a clause of limitation. The phrase "now residing with them" excluded all the mixed bloods not then residing with the tribe.

(*b*) In said Article 4 of the treaty of 1865 it is provided "said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive."

Pursuant to the provisions of Article 4 of the treaty of 1865, under rulings and regulations prescribed by the Secretary of the Interior, a list of allotments were agreed to by the Omaha tribe of Indians in which was set down the name of the allottee and the description

of the land to which each allottee was entitled. (See p. 8 of this brief *supra*.) To the said list of allotments the chiefs of the Omaha tribe of Indians attached their certificate, "that the persons whose names are enumerated in the foregoing schedule are members of the Omaha tribe of Indians and entitled to selections of land in severalty under the provisions of Article 4 of the treaty of March 6, 1865, etc." (See p. 8 of this brief.) The said schedule of allotments was approved by the Indian Agent and by the Superintendent of Indian Affairs (see p. 10 of this brief), and the same was submitted to and approved by the Secretary of the Interior. (See p. 11 of this brief.)

Said schedule of allotments so adopted and approved by the Secretary of the Interior became "final and conclusive," and necessarily excluded all persons whose names did not thereupon appear, and it is conceded that no one of the complainants then resided on the Reservation, and that neither their names nor the names of their ancestors appeared in said schedule.

(*c*) The Interior Department has at all times constructed Section 5 of the Act of 1882 in connection with the provisions of Article 4 of the treaty of 1865. Commissioner Morgan, Aug. 27, 1890, expressed the views of the Interior Department as follows: (Rec. p. 160.)

> "That none but members of the Omaha tribe and their half or mixed blood relations residing with them at the date of the treaty of 1865 whose names are borne upon the duly certified census roll of 1871, of the Omahas, which was approved by the Department—showing the names of those who were entitled to selections of land in severality under the treaty aforesaid, or the descendants of those so enrolled,

and such others as might have been lawfully admitted into the tribe, would be entitled to receive allotments of land thereunder."

Commmissioner Price said under date of September 13, 1883: (Rec. p. 138.)

"The law under which the allotments to the Omahas are being made relates to the treaty of March 6, 1865, (14 Stat., 667) which should be taken as a guide as to determining who are entitled to allotments."

Commissioner Price in his instruction to Wilkinson, Indian Agent, under date of October 5, 1883, said: (Rec. p. 141.)

"That the law under which the allotments to the Omahas are being made relates to the treaty of March 6, 1865, there can be no question. That treaty provides that lands in severalty shall be assigned 'to members of the tribe, including their half or mixed blood relatives *now residing with them.*' I believe it is not contended and it seems perfectly clear that the present claimant was not living with the tribe at the date of said treaty. Manifestly then she was not a beneficiary under said treaty in respect of the allotments therein provided; for only those half or mixed blood relatives *then residing* with them could be so entitled."

Commissioner Oberly, in his report to the Secretary of the Interior, under date of November 14; 1888, said (rec. p. 151):

"The allotment of land on the Omaha Reservation was made under provisions of the Act of Congress approved August 7. 1882, (22 Stat., 341); and the said act expressly stipulates and

> provides that the said allotments shall be deemed and held to be in lieu of 'the allotments or assignments provided for in the fourth article' of the treaty with the Omahas, concluded March 6, 1865, and for 'whom, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by 'the Commissioner of Indian Affairs, as in said Article provided.' "

In the same communication the Commissioner, as to the construction given to the act said (rec. p. 154):

> "From the foregoing, it will be observed that under the construction placed upon the act of August 7, 1882, by this office, none but members of the tribe and their half or mixed blood relations residing with them at the date of the treaty of 1865, whose names are borne upon the duly certified census roll of 1871, or their descendants, and such others as may have been lawfully admitted into the tribe, would be entitled to receive allotments of land thereunder."

Hon. Wm. F. Vilas, Secretary of the Interior, in his ruling in the Frank Peters case, under date of December 5, 1888, affirmed the correctness of the construction put upon the act of 1882 by the Commissioner of Indian Affairs. (See his letter quoted *supra*. Rec. p. 155.)

The Secretary of the Interior in his ruling rejecting the adoption of Margaret and Thomas L. Sloan, under date of September 6, 1894, follows the same rule of construction of the act of 1882, as a reason why the plaintiff should not be adopted into the Omaha Indian tribe. (See letter *supra*, Rec. pp. 156-8). The Secre-

tary of the Interior in his ruling to the Commissioner under date of November 17, 1896, again adhered to the construction of the act of 1882. (Rec. pp. 165-8). The Interior Department has at all times consistently and frequently ruled that the act of 1882, must be construed in connection with the provisions of article 4 of the treaty of 1865, and that line of construction has been adhered to from the date of the passage of the law in 1882 down to the present time, a period of twenty years.

IX

Accepting Allotments Under the Act of July 31, 1854, in Fulfillment of the Treaty of 1830 on the Nemaha Reservation, Extinguished the Right of the Complainants to Further Allotments.

(*a*) In the opening of this brief we said that the objective purpose of the treaty of 1830 was to forever separate those mixed bloods from the tribe, and we there stated the reasons therefor, which need not be repeated here. The effect of that separation was to take the complainants out of the membership of the tribe, if purchance they ever were members therein. It was the evident purpose that the Omaha Reservation should belong exclusively to the members of the tribe who remained thereon, and that the Nemaha Reservation should belong to the mixed bloods, who should remove thereto and accept allotments therein. When the mixed bloods moved on to the Nemaha Reservation and accepted allotments therein, they accepted the benefits of that treaty and acquiesced in its provisions and purposes.

These mixed bloods have no more right to now claim

an allotment on the Omaha Reservation, than the full blood members of the tribe would have to claim an allotment on the Nemaha Reservation.

The obligations under the treaty of 1830 were reciprocal. It was just as binding upon the mixed bloods to accept the provisions therein made for them, as it was for the full blood Indians to remain upon the Omaha Reservation. If the mixed bloods could claim the right to *two* allotments, then likewise the full blood Indians could equally claim the right to *two* allotments, one upon each Reservation. The mere suggestion of such a right discloses its unreasonableness and inconsistency. When the treaty of 1830 was made neither the Indians nor the government contemplated that the full blood Indians might deprive the mixed bloods of the use and benefits of the Nemaha Reservation. Neither did they contemplate that the mixed bloods who accepted the benefits of that treaty should deprive the full bloods of the benefits of the Omaha Reservation.

Again let us suggest that the position of the complainants is one of asserting greater rights and greater privileges than those which attach to the full blood Indians. The Nemaha Reservation, under the act of 1854, has been disposed of in fee simple to the mixed bloods. They have had the full benefits of it. To now permit them to have allotments upon the Omaha Reservation would be the bestowing upon them privileges and benefits greater than can be bestowed upon the full blood members of the tribe. Under the law the full blood members of the tribe can have but one allotment, and that limited to 160 acres for the head of a family. The complainants have already received 320 acres on the Nemaha Reservation, and are now

asking 160 acres more upon the Omaha Reservation. If they are right in this contention, the complainants, as heads of families, would receive 480 acres of land, while a full blood member of the tribe could receive but 160 acres as head of a family. Certainly it was not the intention of Congress that the act of 1882 should confer extraordinary benefits and gratuities upon the mixed bloods to the injury and detriment of the full blood.

(*b*) The Department of the Interior has frequently ruled that the treaty of 1830 was intended to separate the mixed bloods from the tribe, and that the treaty of 1865 only contemplated allotments to mixed bloods then residing with the tribe, and that the act of 1882 did not contemplate the giving of allotments to mixed bloods who had accepted allotments on the Nemaha Reservation, and who had not been re-adopted into, or were not members of the Omaha tribe of Indians when the act of August 7, 1882, was passed.

Commission Price in his instruction to the Indian Agent under date of October 5, 1883, said: (Rec. p. 141.)

> "The Omahas had already (by a former treaty, July 15, 1830,) provided for such of their half-breed brethren as were not residing with them at the date of the treaty aforesaid, and it was undoubtedly by reason of such prior beneficial provision that the instruction was made in the treaty of 1865 limiting the allotments to 'the half or mixed-blood relatives then residing with them.'"

He then states that the Barada family had been provided for on the Nemaha Reservation; and assigns

the same as a reason why the Barada family should not receive allotments under the act of 1882. (Rec. p. 141.)

A like line of reasoning and like statements run through all the communications between the Interior Department and the allotting agent, and the Interior Department and the Indian agent, and in the rulings of the Secretary of the Interior from 1883 down to the commencement of these litigations."

The Secretary of the Interior in his ruling in the Sloan cases under date of November 17, 1896, said: (Rec., p. 166.)

> "Mrs. Margaret Sloan received an allotment of 320 acres of land as a half-breed Omaha Indian under the provisions of article (10) of the treaty of July 15, 1830, with the Omahas, and their tribes. (7 Stat., 328-330.) Provision being made therein that the parties to the treaty might be permitted to make some provisions for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, etc.

The Secretary then recited that Margaret Sloan received a patent under date of September 10, 1860, and William E. Sloan a like patent for 320 acres of land each on the Nemaha Reservation, and then states: (Rec. p. 167).

> "Their claims as such mixed-bloods were extinguished by the lands given them under the terms of the 10th article of the treaty named."

The Secretary then proceeds to show that the Omaha tribe of Indians who were parties to the treaty of 1830 and 1865, and whose consent was necessary to the act of 1882, understood the said treaties and the said act of 1882 in the same sense in which it has been

interpreted by the Interior Department, and said: (Rec. p. 167).

> "As showing that the Omahas so regarded this provision, they provided in their treaty of March 6, 1865, (14 Stat., 667, article 4) that allotments of land in their Reservation in Nebraska, should be given to 'their half or mixed blood relatives now residing with them,' and when many of the mixed bloods from the Nemaha Reserve went to the Omaha Reservation to secure more land, after the passage of the act of August 7, 1882, (22 Stat., 341), which provided for the sale of a part of the latter Reservation and allotment of land in severalty, the Omahas strenuously objected and called upon the Department to remove these half-breeds from their Reservation. They so objected to the Sloans. The claims of Margaret and her son William E. were extinguished prior to the birth of Thomas L."

Secretary Francis in the same judgment said: (Rec. p. 167).

> "The birthright claim of Margaret has been extinguished. Thomas L. never had such claim."

Secretary Bliss in his report in the Artemesia Frost case, under date of June 21, 1897, said: (Rec. pp. 168-9.)

> "Mrs. Frost is the daughter of Margaret Sloan, a mixed blood Omaha woman, whose case was decided adversely by the Department on November 17, 1896, on the ground that her 'birthright' claim had been extinguished under the provisions of Article X (10) of the treaty of July 15, 1830. * * * *
>
> "As showing that the Omahas regarded that

the claim of such mixed-bloods were extinguished by the lands given them under the provisions of the treaty cited, the following provision was made in Article IV (4) of the treaty with them of March 6, 1865 (14 Statutes, 667-668).

"The Omaha Indians being desirous of promoting settled habits of industry and enterprise among themselves by abolishing the tenure in common by which they now hold lands, and by assigning limited quantities thereof in severalty to the members of the tribe *including their half or mixed-blood relatives now residing* with them.

"By her own admission, Mrs. Frost's birthright claim has been extinguished. To admit her present claim would be an injustice to those of the tribe who have never received allotments, and who alone are entitled to participate in the division of the lands in the diminished reserve: would also be against public policy, and a violation of the rules and regulations of the Department, which prohibit more than one allotment to an Indian, for any reason whatever."

We wish particularly to draw attention to the last above quoted paragraph from the opinion of Secretary Bliss, to the point that the granting of these double allotments would be a violation of the rules and regulations of the Department, which prohibited the granting of more than one allotment to the same person under any circumstance whatsoever.

Interpretation put upon the treaty of 1830 and the Act of 1882 by the Interior Department, to the effect that a half-breed who had accepted an allotment under

said treaty was not entitled to an allotment under the act of 1882, should have great weight.

Hastings &c. R. v. Whitney, 132 U. S., 357-366.

United States v. Moore, 95 U. S., 760-763.

United States v. Winona, &c., 32 U. S. App., 296.

Edward's Lessee v. Darby, 12 Wheat., 210.

In *Hastings, &c. R. v. Whitney, supra*, it was said, p. 366:

> "It is true that the decisions of the Land Department on matters of law are not binding upon this court in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *United States v. Moore*, 95 U. S., 760, 763, this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draughtsmen of the laws they are called upon to interpret.'"

In *United States v. Moore, supra*, Mr. Justice Swaine said, page 763:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

In *Edwards Lessee v. Darby*, 12 Wheat., 210, the Court said:

> "In construction of a doubtful and ambiguous

law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

In *Smythe v. Fiske*, 23 Wall., 374, Mr. Justice Swayne, in construing a revenue law, said (p. 382):

"The construction we have indicated of these statutes is that given to them in their practical administration by the Treasury Department ever since their enactment. This, though not controlling, is not without weight, and is entitled to respectful consideration."

In *United States v. Pugh*, 99 U. S., 265, Mr. Chief Justice Waite said (p. 269):

"It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law, the contemporaneous consideration of those who have been called upon to carry it into effect is entitled to great respect. *Edward's Lessee v. Darby*, 12 Wheat., 210. While, therefore, the question is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of Claims for so long a time."

In *Hahn v. United States*, 107 U. S., 402, Mr. Justice Blatchford said (p. 406):

"That such construction did not appear to it unreasonable, and might well have been reached in the exercise of a sound judgment, and that regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this court in *United States v. Pugh*, 99 U. S., 265, that, 'in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been

called upon to carry it into effect, is entitled to great respect. *Edward's Lessee v. Darby*, 12 Wheat., 210,' and where this court refused to interfere with such construction after it had been acted upon for a long time."

In the *5 Per Cent Cases*, 110 U. S., 471, Mr. Justice Grey said, (p. 484:)

"The conclusion to which the court is brought upon a consideration of the language of the statutes relied on, and of the nature of the subjects to which they refer, accords with the contemporaneous and uniform construction given to them by the executive officers charged with the duty of putting them into force. If the court had a doubt of the true meaning of their provisions, this practical construction would be entitled to great weight. *Edwards v. Darby*, 12 Wheat., 206; *United States v. State Bank of North Carolina*, 6 Pet., 29; *United States v. McDaniel*, 7 Pet., 1; *Surgett v. Lapice*, 8 How., 48; *Smythe v. Fiske*, 23 Wall., 374; *United States v. Moore*, 95 U. S., 760; *United States v. Pugh*, 99 U. S., 265; *Swift Co. v. United States*, 105 U. S., 691, 695."

In *Brown v. United States*, 113 U. S., 568, Mr. Justice Woods said, pp. 570-1:

"It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the enactment of the act the President and the Navy Department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under

its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale."

Mr. Justice Woods then reviews many of the prior cases upon this branch of the construction of a statute, and thence concluded, p. 571:

"These authorities justify us in adhering to the construction of the law under consideration adopted by the executive department of the government, and are conclusive against the contention of appellant, that Sec. 23 of the act of August 3, 1861, did not apply to warrant officers."

In *Peabody v. Stark*, 16 Wall., 240, Mr. Justice Miller in construing the Internal Revenue Act, said, p. 243:

"In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue Commissioners."

In *United States v. Hill*, 120 U. S., 169, Mr. Justice Blatchford said, p. 182-183:

"In *Edward's Lessee v. Darby*, *12 Wheat.*, 206, 210, it was said:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. To the same effect are *United States v. Dickson*, 15 Pet., 141, 145; *United States v. Gilmore*, 8 Wall., 330; *Smythe v. Fiske* 23 Wall.,

374, 382; *United States v. Moore*, 95 U. S., 760, 763; *United States v. Pugh*, 99 U. S., 265, 269; *Hahn v. United States*, 107 U. S., 402, 406; *and Five per cent. Cases*, 110 U. S., 471, 485. In the case of *Brown v. United States*, 113 U. S., 568, the same doctrine was applied, the cases in this court on the subject being collected, and and it being said, that a 'contemporaneous and uniform interpretation' by executive officers charged with the duty of acting under a statute 'is entitled to weight' in its construction, 'and in a case of doubt ought to turn the scale.' A still more recent case on the subject is *United States v. Philbrick, ante*, 52, where this language is used: 'A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned.'"

In *United States v. Philbrick*, 120 U. S., 52, Mr. Justice Harlan said, p. 59:

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned. See *Hahn v. United States*, 107 U. S., 405, and *Brown v. United States*, 113 U. S., 571, and authorities cited in each case."

In *United States v. Johnson*, 124 U. S., 236, Mr. Justice Harlan said, p. 253:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its

execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. *Edwards v. Darby*, 12 Wheat., 206, 210; *United States v. Moore*, 95 U. S., 760; *Hahn v. United States*, 107 U. S., 402; *United States v. Philbrick*, 120 U. S., 52, 59."

In *Schell's Executors v. Fauche*, 138 U. S., 562, Mr. Justice Brown said, p. 572:

"As early as 1803, it was held by this court, in *Stuart v. Laird*, I Cranch, 299, 309, that a practical construction of the constitution that the Justices of the Supreme Court had a right to sit as circuit judges, although not appointed as such, was not open to objection."

'It is sufficient to observe,' says the court, 'that the practice, and acquiescence under it, for a period of several years, commencing with the organization of the judical system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.' In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling. *McKeen v. DeLancy's Lessee*, 5 Cranch, 22; *Edwards' Lessee v. Darby*, 12 Wheat., 206; *United States v. Alexander*, 12 Wall., 177; *Peabody v. Stark*, 16 Wall., 240; *Hahn v. United States*,

107 U. S., 402; *Rogers v. Goodwin*, 2 Mass., 475; *Endlich on Stats.*, sec. 357."

In *United States v. Alabama R. R. Co.*, 142 U. S., 615, Mr. Justice Brown said, p. 621:

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute."

In *United States v. Winona R. R. Co.*, 32 U. S. Appeals, 274, Sanborn, C. J., said, p. 295-296:

"Up to that time the officers of the Land Department had uniformly held that the railroad company had earned and was entitled to these lands under the acts of Congress. In *Hastings & Dakota Railroad Company v. Whitney*, 132 U. S., 357, 366, the Supreme Court said of the action of these officers in a similar case: 'It is true that the decisions of the Land Department on matters of law are not binding upon this Court in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court.' In *United States v. Moore*, 95 U. S., 760, 763, this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the

most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret. See also *Brown v. United States*, 113 U. S., 568, 571, and cases cited; *United States v. Burlington &c. Railroad*, 98 U. S., 334, 341; *Kansas Pacific Railroad v. Atchison Railroad*, 112 U. S. 414, 418.'"

In *United States v. Barber*, 41 U. S. Appeals, 424, in speaking of the interpretation relating to interest on claims, the court said, p. 433:

"This is the construction given by the executive departments, and in *Brown v. United States* 113 U. S., 568, 571, citing *Edwards' Lessee v. Darby*, 12 Wheat., 206, it is said: 'In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect.' See also *Atkins v. The Disintegrating Company*, 18 Wall., 272; *Smythe v. Fiske*, 23 Wall., 374, and *United States v. Moore*, 95 U. S., 760, 763. In the latter case the court observed that 'the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.'"

In *Grossett v. Townsend*, 86 Fed., 908, the Court said (p. 912):

> "This was the construction placed upon the law by the officers of the Treasury Department at the time when it went into effect. In a case of doubt as to the meaning of a statute, it is proper to consider the contemporary construction placed upon it by those upon whom the duty is imposed of enforcing its provisions. *Schell's Ex'rs v. Fauche*, 138 U. S., 562, 11 Sup. Ct., 376; *Hahn v. U. S.*, 107 U. S., 402, 2 Sup. Ct., 494; *U. S. v. Pugh*, 99 U. S., 265; *Peabody v. Stark*, 16 Wall., 240; *Edwards' Lessee v. Darby*, 12 Wheat., 206."

In *J. D. Peters*, 56 U. S. Appeals, 713, the Court said (p. 721):

> "This was the construction placed upon the law by the officers of the Treasury Department at the time when it went into effect. In a case of doubt as to the meaning of a statute it is proper to consider the contemporary construction placed upon it by those upon whom the duty is imposed of enforcing its provisions. *Schell's Executors v. Fauche*, 138 U. S., 562; *Hahn v. United States*, 107 U. S., 402; *United States v. Pugh*, 99 U. S., 265; *Peabody v. Stark*, 16 Wall, 240; *Edwards' Lessee v. Darby*, 12 Wheat., 206.

In *United States v. Dean Linseed Oil Company*, 57 U. S. App., 716, the court said, p. 722:

> "The importance of adherence to a long continued and reasonable construction of a statute by the officers of the Department whose duty it has been to execute it, when the statute is of an ambiguous character, has been frequently commented upon by the Supreme Court, ever

since the case of *Edward's Lessee v. Darby*, 12 Wheat, 206, 210, in which the court said: 'In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.' The uniform construction of the Treasury Department seems to us reasonable and equitable to the importer and the Government."

In *Bloxham v. Consumers', Etc., R. R. Co.*, 36 Fla., 519 (51 Am. St. Rep., 49), the court said:

"In such case we think the greatest deference and respect should be paid by this court to the long prevailing construction of the statute made by the Executive Department of the State Government, and we will not interfere with the same."

In *Solomon v. Commissioners of Cartersville*, 41 Ga., 157, the court said, adopting the practical construction of a statute made by the Executive Department of the Government, that if the matter were before them as an original, independent proposition they would be inclined to hold differently, but yielded their own views to such practical construction.

In *Wright v. Forrestal*, 65 Wis., 341, the court said, pp. 348, 349.

"The construction given to a statute by the body of men or officers who are directed to act upon it is always entitled to weight, and their construction should not be overridden by the courts, unless it be contrary to the clearly expressed meaning of the law."

In *Westbrook v. Miller*, 56 Mich., 148, the court said, p. 151:

"When, in the performance of executive du-

> ties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of considerable time before its acts are called in question. This has been several times held by the Federal Supreme Court, and by the subordinate courts of the Federal system, and a reference to a few of the cases will be sufficient to show the current of decision."

And again the court said, p. 152:

> "The cases in other states which hold the same doctrine are too numerous for citation, but as they all rest upon the inconvenience that would arise from unsettling what in good faith has been done in the necessary discharge of public duty, many citations would only serve to show the frequency in which the occasions for the application of the principle arose."

In *Commonwealth v. Lockwood*, 109 Mass., 323, (12 Am. Rep., 699), the Supreme Court of Massachusetts applied the same rule of construction to the constitution:

> "If the words of the constitutional provision could be deemed ambiguous, their interpretation must be held to be settled by the contemporaneous construction and the long course of practice in accordance therewith."

The complainants endeavored to break the force and effect of the rulings of the Department, by introducting evidence to show that certain persons and their descendents who have received allotments on the Nemaha Reservation, also received allotments under the Act of 1882. At most these would be mere inci-

dents not material to the present cases. (1) In that they do not relate to any of the present complainants. (2) And for the reason that there is nothing in the record to show that the Department was ever advised of said double allotment.

How said persons came to receive allotments under the Act of 1882, the complainants do not explain. It must be presumed that they were properly adopted into the tribe, and received the allotment with the consent of the tribe. Persons thus recognized by allotment under the Act of 1882, were the Cabney, Paul, Fuller, Scott, and Moncravey families. The last above names appear on the allotment book of 1871, which was approved by the Chiefs of the tribe and subsequently approved by the Secretary of the Interior. (Rec., p. 171-182.)

The presumption would be that the names were properly put upon the allotment book, and that therefore were properly recognized as members of the tribe in 1871, and entitled to a certificate of allotment under the treaty of 1865. Having received certificates of allotment under the treaty of 1865, pursuant to the schedule of allotments, they became and were entitled under the provisions of Section 5 of the Act of 1882, to an allotment under said act as a matter of course. For it is provided in the said Section, that the allotment so to be made shall be in lieu of the allotments made under the treaty of 1865, and that persons holding certificates of allotment under the said treaty shall be entitled to select an allotment under the Act of 1882. It also follows that the children of persons whose names appear on the tract book would be members of the tribe.

But neither the names of the complainants nor their

ancestors appear upon the allotment book of 1871, and they have not been adopted into the tribe.

In further confirmation of the uniformity of the rulings of the Interior Department upon the point under discussion, we refer to the ruling upon the application of Joseph O'Pelt to be enrolled as a member of the Otoe tribe of Indians, and for an allotment of land upon the Otoe Reservation in Oklahoma.

O'Pelt was one of the mixed-blood Otoes who received the benefit of an allotment on the Nemaha Reservation, under the act of July 31, 1854. The Secretary of the Interior denied the right of the Joseph O'Pelt and nine members of his family, to become enrolled among the Otoes, and denied his right to allotment upon the Otoe Reservation.

The ruling of the Secretary is as follows: (Rec., pp. 169-170).

DEPARTMENT OF THE INTERIOR,
WASHINGTON, November 10, 1897.

The Commissioner of Indian Affairs:

SIR: I acknowledge the receipt of your communication of June 25, 1894, in the matter of the applications of Joseph O'Pelt and the nine others of his family for enrollment as members of the Otoe tribe of Indians in Oklahoma, and to be given allotments as such.

It is shown by your letter that this family, or such of them as were in being at that time, enjoyed the benefits of the Act of July 31, 1854, and received allotments on the Great Nemaha Half Breed Reservation, and also that their applications for enrollment as members of the Otoe tribe of Indians have twice been rejected by the Otoes in council.

You submit whether the applications of the

O'Pelt family be again submitted to the Indians for their action in open council; and, in the event of the adoption of said applicants by the tribe, for the purpose of giving them allotments on the Otoe reservation, ask whether the Department will authorize the making of much allotments to them.

In view of all the circumstances, I see no reason for again submitting the application of this family to the Indians for their action in open council; they seem to have enjoyed the benefits of allotments as mixed bloods on the Great Nemaha half-breed reservation, Nebraska, and are not entitled to further allotment on the Otoe reservation, Oklahoma.

The papers submitted with your letter are herewith returned.

Very respectfully,

C. N. BLISS,

Secretary."

It may be suggested that the complainants are asserting a right to allotments upon the Omaha Reseruation *in their own right* and not through their ancestors. There is no force in that suggestion. If the purpose of creating the Nemaha Reservation was to separate the mixed bloods from the tribeand the mixed bloods did go upon the Reservation and accept allotments of lands thereon, *the act of separation included the parents and the children living with them.*

The act of accepting allotments was for the benefit of the family. If such allotment extinguished the birthright of the parents, it likewise extinguished the birthright of the minor children.

There is not a single complainant but who received an allotment in person on the Nemaha Reservation, or

who was not at the time a minor child of a parent that had received an allotment upon said Nemaha Reservation. It would destroy the whole efficacy and purpose and intent of the treaty of 1830, to say that the parent would be dismembered from the Omaha tribe by the taking of an allotment on the Nemaha Reservation, but that the children of such parents could return to the Omaha Reservation and claim membership in the Omaha tribe of Indians, and the right to allotment of lands upon the Omaha Reservation. The utility of the separation contemplated by the treaty of 1830 would be thereby destroyed.

This is further manifest from the fact that when these mixed bloods accepted the benefits of the Nemaha Reservation, their minor children living with them also went to the Nemaha Reservation, and the allotments provided for on the Nemaha Reservation were for the families or heads of families and which necessarily included minor children. Again some of the complainants were born upon the Nemaha Reservation of parents who had accepted the benefits of the Nemaha Reservation, and if the birthright of the parents was extinguished by the receiving patents for lands on the Nemaha Reservation, it would necessarily follow that their children thereafter born on the Nemaha Reservation would not have any birthright to allotments on the Omaha Reservation.

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XI

The Omaha Tribe of Indians Constantly and Persistently Protested that the Complainants were not Members of the Omaha Tribe of Indians, and were not Entitled to Allotment of Lands.

In addition to the Department rulings that the complainants were not members of the Omaha tribe of Indians, and were not entitled to receive allotments under the act of 1882, the *Indian tribe* has constantly and persistently protested against the complainants being members of the tribe or being entitled to an allotment of lands.

(*a*) The omission of the names of the Sloan and Barada and Monette families from allotment book of 1871, was a declaration by the Chiefs of the Omaha tribe of Indians, that the complainants were not then members of the tribe and were not entitled to allotments of lands. It was so treated by the Commissioner of Indian Affairs in his letter of instruction to the Allotting Agent under date of September 13, 1883, when he refers to the fact that neither the name of Celestia Kuhn nor her father Antoine Barada, appear upon the schedule which had been certified by the tribe under date of December 30, 1870, and approved by the Secretary of the Interior, January 26, 1871. (Rec. p. 138.)

The effect of the allotment book of 1871 was again considered by the Commissioner of Indian Affairs in his letter of instruction to the Indian Agent under date of October 5, 1883, as proof that the Barada family

were not recognized as members of the tribe. (Rec. p. 141.)

(*b*) Allotting Agent Fletcher, in a report to Commissioner in the Peters case, under date of July 28, 1883, said: (Rec. p. 135.)

> "Since my arrival a full council has been held on the subject of admitting these mixed bloods from Nemaha and elsewhere at which Mrs. Peters and her sister were present, and the voice of the councilmen and the people were unanimous that mixed bloods be not allowed to take land under the present act."

In the concluding part of her report she speaks of being: (Rec. p. 135.)

> "the unanimous wish of the tribe expressed in open council that Mrs. Peters do not receive allotments of land."

In the Allotting Agent's report to the Commissioner under date of September 25, 1883, relating to the Kuhn family, it was said: (Rec., p. 139.)

> "The tribe are unanimous against these mixed bloods remaining on the reservation, and council was held to-day in which the councilmen urged them to free them at once from these people who are trying to eat up the land."

In the report of the Alloting Agent in the Margaret Sloan case under date of April 28, 1884, it was said: (Rec., p. 146.)

> "Her claims have been fully investigated in an open council of the tribe."

(*d*) The Omaha tribe of Indians under date of March 19, 1888, sent to the Commissioner of Indian

Affairs a protest in writing against the Peters family and others of like class, occupying or receiving lands upon the reservation and which is quoted *supra*. In said protest it is recited that the tribe had told the Peters family to go away, and that because they would not go the appeal was made to the Commissioner of Indian Affairs to remove them. (Rec., pp. 142-3.)

(*e*) In the report of Commissioner Oberly to the Secretary of the Interior, under date of November 14, 1888, he stated: (Rec., p. 151.)

> "The Indians of the reservation manifested the most determined opposition to their (mixed bloods) being allowed to participate in the distribution of the land."

(*f*) In the letter of the Commissioner to Thomas L. Sexton under date of August 27, 1890, Hon. T. J. Morgan said: (Rec., p. 160.)

> "The Indians of the Omaha Reservation manifested the most determined opposition to such persons, being allowed to participate in the distribution of the land, * * under date of March 19, 1888, sixty-five Indians of the Omaha Reservation addressed a communication to this office protesting against giving an allotment to Mr. Peters, who was alleged to belong to one of the mixed-blood families, provided with land on the Nemaha Reservation by the Omaha tribe by the 10th Article of the treaty of July 15, 1830."

(*g*) In January, 1891, a duly accredited delegation of Omaha Indians waited on the Commissioner of Indian Affairs at Washington and urged the removal of these mixed-blood intruders. (See letter of Commissioner to Secretary of the Interior, under date January

12. 1891.) (rec. p. 163.) Subsequently, under date of January 13, 1891, the Commissioner, in his instructions to Ashley, Indian Agent, said that the delegation of Indians then in Washington specially objected to William Barada, Thomas Sloan, Mrs. Fulton Peters, Frank Peters, Walter Peters, and Mrs. Sailor and their families. (Rec., p. 165.)

(*h*) When Thomas L. Sloan made an effort to have Margaret Sloan and himself adopted into the tribe, the same was resisted by a majority of the tribe, and that was one of the reasons assigned by the Secretary of the Interior for refusing their adoption. (See the Secretary's letter to Commissioner under date of September 6, 1894.) (Rec., pp. 156-8.)

(*i*) In addition to the above record evidence of council meetings of the tribe we have on file the evidence of Anna Cabney, White Horse, Sinda-ha-ha and others, that council meetings were held while Alice C. Fletcher was making allotments in 1883 and 1884 to consider who were and who were not entitled to allotments under the act of 1882.

The council meetings above recited and the protests above noted are evidence of a fixed and determined purpose on the part of the Omaha tribe of Indians not to receive the mixed blood complainants into the tribe, and is proof of a constant and repeated declaration on their part, that they did not recognize the complainants as members of the Omaha tribe of Indians. That was a subject matter that they ought to know more about than anybody else.

XII

Complainants not Entitled to the Particular Lands in Dispute.

The Disputed Lands Have Been Allotted and Patented to Other Persons.

Lands Have Been Reserved for the Complainants if it be Ultimately determined That They Are Entitled to Allotments.

The Lands so Reserved are the Lands Upon Which the Complainants Have Their Place of Residence in so far as Any of Them Reside Upon the Reservation.

It appears in the stipulation of facts filed in the Sloan case (Rec. pp. 72 to 74) in the Peters case (Rec. pp. 357 to 359) and in the Monette case (Rec. pp. 490-1) that allotting agent Rankin investigated the claims of the several complainants to the different tracts of land to which they asserted selections and likewise examined into the claims of different members of the Omaha tribe of Indians, who asserted a selection to the same lands or parts thereof for allotment. In many instances the allotting agent found that the Indian claimant had made a prior selection to, or had a better claim to parts or parcels of the land in controversy, than the complainants. In such cases the allotting agent made an allotment to the Indian claimants who are made co-defendants, but in every instance (with possibly one exception) reserved for the complainants the land upon which they had their respective habitations and improvements.

To illustrate the difficulties which the allotting agent labored under in determining the priority of selections

between the complainants and the present patentees, we need but look at the uncertainty and vagueness of the facts presented in the respective cases, as to when the contending parties first made their selections. There was no manner of keeping a record of selections. An Indian would go upon a tract of land and proclaim *to himself* that was his selection. Such was the manner in which Artemesia Frost states that she made her selection. There was no entry of the selection in any record book. There was no notification given to anybody of the selection. (Rec. p. 105).

In some instances the claimant would plow a single furrow around the land. A few years would go by and the furrow would become tramped out by grazing cattle. Another Indian would come along and select the same land by again plowing around it or by enclosing a part of it by a fence, and then assert a prior right by selection.

Again the priority of selection depended frequently upon the year when the selection was made, but the Indians do not know years by number. They do not compute time in that way. An Indian cannot tell you in what year he was born, nor in what year an event happened. The half-breeds may be able to fix dates by years, but that fact in a measure enables the complainants to take advantage of the full blood Indians.

The court will see by an examination of the proofs in the cases that if it should undertake from this limited evidence to investigate the priorities of selections by respective claimants, that it would be entering upon the domain of vague speculation. Let us take a few illustrations:

In Doc. T. 174 the suit was originally brought in the name of Margaret Sloan. It is now prosecuted in

the name of John M. Sloan, Thomas L. Sloan and Artemesia Frost as the heirs of Margaret Sloan and who make claim to the lands which it is pleaded had been selected by Margaret Sloan. It appears from the testimony of the complainant's witnesses, Anna Cabney and the plaintiff Artemesia Frost, that Margaret Sloan claims to have selected for a home and lived upon the N. ½ of the N. E. ¼, Section 20, T. 24, R. 8. It is stipulated as a fact that Margaret Sloan lived on the above described land, (See par. 15, Stip. 174,) (Rec. p. 64), that this was her home residence, a question of fact about which there is no controversy.

It is claimed in the pleading that she was the head of a family and therefore entitled to 160 acres. She was not the head of a family. Her husband Thomas Sloan did not die until 1893 (See par. 12, Stip. Doc. T. 174.) (Rec. p. 63.) The children had long passed the age of minority. Artemesia Frost was the youngest, born in 1848, John M. Sloan never lived on the Reservation with Margaret Sloan, but lives in Aspen, Colorado. William E. Sloan died in 1865. (See par. 13, Stip. T. 174.) (Rec. p. 63.) Artemesia Frost married Leonard Frost 1870. (See par. 18, Stip., T. 174.) (Rec. p. 65.) Thomas L. Sloan, the grandson, moved to Pender in 1891, where he has since lived as the head of his own family, and engaged in the practice of law. (See par. 15, Stip. Doc. T. 174.) (Rec. p. 64.)

In no sense of the word was Margaret Sloan the head of a family either before or after her husband's death. Yet, pending this litigation there has been reserved 160 acres, to-wit: The N. E. ¼ of section 20,

T. 24, R. 8, E., and which includes the land on which she lived.

About 1893 it is asserted that Margaret Sloan made claim to 80 acres of additional land, to-wit: S. W. ¼ of N. E. ¼ and S. E. ¼ of N. W. ¼, section 35, T. 25, R. 7. It will be noted that the additional land selected was in a different township and a great distance from the land on which Margaret Sloan lived. There are no proofs in the case to show that Margaret Sloan personally had anything to do with or knew anything about the selection of the land sec. 35, T. 25, R. 7.

Stephen J. Snyder in his deposition for the complainants states that he was hired by Thomas L. Sloan in the year 1893, to break up the land in Sec. 35, T. 25, R. 7, for which Thomas L. Sloan paid him $180.00, and that he and his brother continued to occupy and live upon said land from 1893 to 1897. (Rec. p. 85). That when they sold any of the crops they accounted to Thomas L. Sloan for the proceeds of the sale, and that no other persons except the Snyders lived upon the said land from 1893 to 1897. During said years they put improvements upon said land valued at about $900.00, to-wit: breaking $120.00, fencing $25.00, dwelling house $600.00, barn and outbuildings $200.00, well $50.00. (Rec. p. 87).

Query: Why did Thomas L. Sloan select said land and hire the said Snyder to occupy and put these improvements upon it, and then subsequently assert claim to it in the name of Margaret Sloan when there is not a word of testimony that Margaret Sloan ever saw the lands or the improvements, or ever wished for the lands or ever authorized Thomas L. Sloan or anybody

else to make the said claim or the said improvements, and it is perfectly clear that she did not furnish a dollar of money for the improvements upon the said lands, and she had no right, title or interest therein. The *answer* is that Thomas L. Sloan was making claim for other lands *in his own* name, hence could not claim these lands, so he makes the claim in the name of his grandmother. The magic hand of Thomas L. Sloan is shown in this matter from par. 17, Stip. Doc. T., 174, (rec. p. 64), whereby it appears that Thomas L. Sloan selected the N. ½ of the N. W. ¼ of the said selection 35, and the N. ½ of the S. W. ¼ of said section 35, T. 25, R. 7, for John M. Sloan, who never was on the Omaha Reservation and lives in Colorado. It will be observed that the two selections adjoin.

Now on the contrary the Grants claim a priority of selection to the lands which the Snyder's occupied for Thomas L. Sloan. It further appears that the surrounding land, to-wit: (Rec., p. 75.) the N. ½ and S. E. ¼ of the N. E. ¼ of Sec. 35, T. 25, R. 7, had been patented to other members of the Grant family in 1883-4, and which fact put the Grants in possession of the adjoining land ten years before the Snyder's went upon it under the employment of Thomas L. Sloan.

John M. Sloan Case. We have above recited the land selected for John M. Sloan by Thomas L. Sloan. In par. 17, Stip. 174, it is agreed that John M. Sloan never had a residence on the Omaha Reservation. His wife came to Pender in 1893 on a visit to Thomas L. Sloan, and she and Thomas L. Sloan agreed upon the N. ½ of the N. W. ¼ of S. 35, T. 25, R. 7, and the N. E. of the N. E. and the N. E. of S. W. of S. 34, T. 25, R, 7, as the land which should be claimed for allotment in the name of John M. Sloan, (Rec., p. 64.)

It appears from the testimony of William F. Springer filed in the John M. Sloan case that the land claimed for John M. Sloan was broken by Charles M. Snyder, who had possession and control under the direction of Thomas L. Sloan (Rec., p. 925). There is nothing in the record to show that John M. Sloan had any personal knowledge of or requested the making of this selection, or that he ever expended or authorized a dollar of expenditure to break up the lands. The visit of his wife to Thomas L. Sloan does not carry with it any evidence that her visit was for the purpose of selecting land. John M. Sloan has not verified a petition in the case, and in the injunction hearings did not make an affidavit in the case, but all these matters were done by Thomas L. Sloan and his hired man, Snyder

It appears from the stipulation of facts in the Jennie M. Arnold case that Thomas L. Sloan has charge of the land claimed in her name and "Thomas L. Sloan has kept all the proceeds arising from the farming of the land except what he may have spent in this litigation and breaking up for farming and holding possession of the same." (Rec., p. 466.)

In a general phrase Thomas L. Sloan is in possession of all these lands and of others, and is himself taking all the fruits of the cultivation and seems to be the real party in interest.

Artemesia Frost Case. The magic hand of Thomas L. Sloan is seen in a similar manner in the Frost claims. There is claimed for Philemon H. Frost the S. ½ of the N. E. ¼ of S. 34, T. 25, R. 8 (Rec., p. 73). It appears from the testimony of Wickersham for the complainant (Doc. T., 507) that the above land had been claimed by J. M. Wickersham, who had made improvements thereon to the value of $300.00, and that in the

year 1891 Wickersham made an arrangement with Thomas L. Sloan for the surrender of his claim to the land for an agreed price. (Rec., p. 825-828.)

It does not appear that Philemon H. Frost was a party to the above transaction, or authorized it or furnished the money. The only person known in connection with the Philemon Frost selection is Thomas L. Sloan.

Artemesia Frost never made a declaration of claim to the lands in controversy. In fact, the lands which she claims to have selected were the lands which were designated by Thomas L. Sloan.

Monette Case. The Monette case furnishes a splendid example of the uncertain manner by which the claimants undertake to prove priority of claim. The heirs of Mary Monette claim land in Sec. 13, T. 25, R. 6, which has been alloted to Silas and Baptisti Hallowell and there is a controversy over priority of claim. The Monette's in order to establish their claim conceded that Alfred Hallowell, the father of Silas and Baptisti, had made the prior claim to the lands in dispute, but insisted that Mary Monette had purchased from Alfred Hallowell his right to said land and agreed to pay him therefor $50.00.

This pretended claim of purchase is asserted by Mitchell Monette, a son, and Cassie M. Karch, a daughter of Mitchell Monette. (Rec., p. 492.) It appears that Alfred Hallowell had selected said land in the year 1892 and plowed around the same in proof of his selection, and in the year 1893 made a written lease of said land for a period of five years. (Rec., p. 493.)

In addition to the foregoing S. H. Campbell states that he staked around 80 acres of said land for Alfred Hallowell, and broke up 40 acres of said land. (Rec.,

p. 494.) The fact of the selection and breaking of said land by Alfred Hallowell is not questioned. The testimoney of Michell Monette and Casse M. Karch to the point that their mother had purchased the land from Hallowell is denied by him, and it appears that *neither* Mitchell Monette or Cassie M. Karch could talk the Omaha *Indian* language and Alfred Hallowell can not talk the *English* language. Hence, it would be impossible for Mitchell Monette and Cassie M. Karch to know anything of said purchase except by heresay. (See Hallowell's testimony, Rec., p. 522.)

It is perfectly clear from the testimony of Mitchell Monette that he, in fact, knew nothing about said purchase. In his testimony he states that Alfred Hallowell was a visitor at the Monettes in 1892 and the talk was in Indian language, which he did not understand. (Rec., p. 520-521.)

Q. Was there any part of the conversation in respect to the land which you, from the talk, yourself understood was a conversation relating to that particular land?

A. Just by the motions that he made, and pointing of it.

The same may be said of Cassie M. Karch, that she really knew nothing of this purchase at all. We do not have the testimony of Mary Monette on the subject.

After all the foregoing testimony had been taken David Monette undertakes to support the purchase of the Hallowell selection, but he, too, only partially understands the Indian language and bases his testimony on what Mary Monette said to him. (Rec., p. 553.)

It is patent, therefore, that the complainants have

failed to make proof of a purchase, and without which, confessedly Hallowell had the prior selection.

It appears from the testimony of William F. Springer, Doc. T. 364, that he was the interpreter of Allotting Agent Rankin, (rec. p. 523) "and that he was present with Rankin during the interview with the Indian claimants for allotments, and that the Monettes did not make any claim or statemet to Rankin, the allotting agent, in his presence or hearing that they had purchased the Hallowell ground; and that he never heard of this claim of the Monettes of the purchase of the Hallowell claim until the taking of this testimony."

The complainants did not make claim to Allotting Agent Rankin for allotment of lands in controversy. William F. Springer, the interpreter for Rankin, states: (See Stip. Doc. T. 364.) (Rec. p. 523).

> "The witness will further testify that allotting agent Rankin, accompanied by the said witness as interpreter, went to the home of Mitchell Monette, John Kuhn, Frank Peters, Lot Sailors, William Barada, for the purpose of getting the names and ages of the children, so that if it was determined that they were entitled to allotments that they might receive allotments as other Indian children. They gave in the names and ages of the children. One or two of the families said that Thomas L. Sloan had the description of the lands that they claimed, but they did not give to the allotting agent any description of any land to which they make claim. That they saw Mitchell Monette and he did not make any claim to agent Rankin to the land allotted to Silas Hallowell and William Hallowell de-

scribed in this case, and did not furnish any description of the lands claimed by the Monette family."

What was said by Springer may be applied to all of the cases, for the reason that no one of the complainants testifies to having appeared before the said Rankin and having claimed an allotment of the particular lands in controversy.

Jennie M. Arnold Case. Jennie M. Arnold is a member of the Monette family. In her petition she makes claim to land for herself and for her two children which has been allotted to Bennie Saunsouci and Florence Filson. The only proof to sustain the claim of Jennie M. Arnold is as follows: Thomas L. Sloan makes statement that in the summer of 1891 that his firm of Sloan & Chase "gave to Jennie M. Arnold the proofs of the subdivision of land which she selected for herself and her minor children; that she made the selection by going over the land and having it marked by a furrow plowed around it; that Charles Graves did the plowing and that Mitchell Monette was with Graves at the time when the plowing was done." (Doc. T, 363, Jennie M. Arnold). (Rec. p. 466).

"Thomas L. Sloan further testifies that a part of the N. ½ of the S. ½ of said Section 13 was broke up in the year 1893, and that he, Thomas L. Sloan, has used and farmed the land broke up since the year 1896 for Jennie M. Arnold, but that he, Thomas L. Sloan, has kept all the proceeds arising from the farming of the land except what he may have spent in this litigation and breaking up for farming and holding possession of the same."

Jennie M. Arnold in person has not verified a

pleading, an affidavit, nor given testimony. There is not a word in this case over her signature to indicate that she knows anything about this litigation or claims any interest in it or in the land in controversy.

It does appear, however, from the statement of Thomas L. Sloan that he caused a part of the land to be broken up in 1893. (Rec. p. 466.) In behalf of the defendants, George Lampson, the stepfather of Florence Filson, states, that he selected said land for his step-daughter in the year 1891; that he broke the south 40 acres in 1891, and has used the same since 1891 by leasing the south said 40 acres to different parties since said date. (Rec. p. 467.)

Josiah Fields states that he is the father of Nellie and Nettie Fields to whom has been allotted the land claimed by Jennie M. Arnold in her *amended* bill of complaint, and that he selected the land for his two daughters in the year 1891, and plowed around all of the S. E. ¼ of said Sec. 13, in said year 1891, and that he was the first person to plow around said land. He will further testify that he leased said land to Lamont Hull in 1893, for three years, and will further testify that Jennie M. Arnold never occupied said lands or made any improvements thereon. (Rec. p. 467.)

It is not claimed by anyone that Jennie M. Arnold ever lived upon the land in controversy, or ever made any improvements other than as is contained in the statement of Thomas L. Sloan quoted *supra*. From all the statements it appears that the Field's and Lampson's first claimed the same lands for their children and grandchildren.

Maggie E. Rockwell Case. Maggie E. Rockwell has not given evidence in her own behalf, and so far as appears from anything in this record she has no per-

sonal knowledge of the pending of this litigation. The only thing we know of her is in the stipulation of facts, par. 18, Doc. T. 267. (Rec. p. 339.)

> "Maggie Rockwell nee Peters, daughter of Fulton Peters and his wife Euphrasia, born in 1860, married Edward Rockwell a free born full blood white man, at Verdon, Richardson County, Nebraska. Came to Omaha Reservation first in 1881, again in 1883, and again in 1885, but did not take up a residence on Omaha Reservation and never lived on Omaha Reservation, and have lived in the State of Iowa for about ten years last past. They have children as follows: Rene Rockwell, born 1885. Walter Rockwell, born 1884."

The only evidence in support of the Maggie Rockwell selection is the statement of Thomas L. Sloan as follows: (Doc. T. 509.) (See p. 878).

> "Thomas L. Sloan will testify that he surveyed for the Rockwell's the land claimed by Maggie Rockwell for herself and her children, as described in the pleadings, and that he, Thomas L. Sloan planted 10 bushels of butternuts on the said land, and the land was plowed around in the spring of 1891; that Walter Peters did the plowing for the Rockwell's. He will further testify that the Rockwell's first selected the land in the year 1881, but they have never occupied or improved further than the breaking of 6 or 8 furrows around it, and the planting of butternuts thereon; that the butternuts were tramped out by the cattle and none are growing; that the persons to whom the said lands have been allotted and patents issued, selected the said lands for allotment in

the year 1893. That the land was leased by the Agent for five years to Rosalie Farley and the rent paid to the Agent and disbursed to the tribe. That the lease expired March 1st, 1901, since which time lease has been made by patentees under the act of March 3, 1893."

We submit that the foregoing is not sufficient to show any selection whatever in behalf of Maggie Rockwell, certainly not sufficient to show that she has any priority of claim.

To set out the facts in detail in each case would be burdensome and unnecessary to the question we wish to consider.

The above recitals from the foregoing cases are sufficient to show the realm of conjecture and uncertainty which surrounds the respective claims and selections. A like vagueness and uncertainty will be found in the examination of all the other cases not above mentioned.

Rankin Alloted under the act of 1893. What right have the complainants to complain of the allotments made by Rankin? The selections made by the complainants according to their showing was after the date of the allotments under the act of 1882, by Alice C. Fletcher, to-wit, '83 and '84. Most of the complainants do not assert a selection prior to 1891-3. Rankin's allotments were made under the act of 1893, which did not authorize him to make the allotments provided for under the act of 1882, but only to make the additional allotments (in acres) provided for in the act of 1893.

It the complainants claimed allotments under the act of 1893, as adverse to the present patentees, they should have presented their claims to the said Rankin

and presented proof of priority of selection. But, it appears from the statement of the interpreter, William F. Springer, that the complainants declined to make proof of claim before the said Rankin, and that the said Rankin was obliged to get his information from an inspection of the lands, from an examination of the tract book, and from such other evidence as he could gather.

XIII

The Court Should not set Aside the Allotments Made by Rankin under the Act of 1893, nor the Patents Which Have Been Issued Pursuant thereto.

The Rankin Allotments were not Based on Findings of Law, but upon Findings of Fact Relating to Priority of Selection.

The Department had Adjudged Prior Thereto that Complainants were not Entitled to Allotments on the Omaha Reservation.

(*a*) In certain of the cases by the amended bills there are made defendants certain Indians to whom Rankin had made allotments of lands under the act of 1893. In all said instances patents have been issued by the government and which facts are set out in the general stipulations, filed in the Sloan case T. 174, (Rec. pp. 72-73), Peters case, T. 267, (Rec. pp. 355-357), and Monette case, T. 364, (Rec. pp. 490-1). As between the claimaints Rankin was only charged with the duty of determining priority of selection. He reserved for the complainants in each and every instance the lands upwhich they lived and reported the said reservations to the Indian Department and the lands so reserved

have been marked upon the maps in the office of the Commissioner of Indian Affairs pending the result of these litigations. The allotments made by the said Rankin were reported by him to the Commissioner of Indian Affairs, and were approved by the Commissioner of Indian Affairs and by the Secretary of the Interior and patents issued to the patentees.

The said Rankin in making the allotments and in determining priority of selection went upon the reservation, was in conference with the Indian tribe and different claimants, and obtained such information as was obtainable from the parties and from other sources. (See Springer's testimony quoted *supra*, also his testimony in Philemon H. Frost case, T. 507 and in John M. Sloan case, T. 579.) (Rec. pp. 824, 925).

Springer was the official interpreter for the allotting agent and was present with him at these interviews with the Indians and is well qualified to speak on this question. What Springer has testified to is not contradicted by any witness.

The said Rankin and his official interpreter being present upon the ground could see what improvements, if any, were upon the lands; what evidences there were, if any, indicating a selection, and hence, were much better qualified, in fact, to decide the question of priority of selection, than we can be who listen only to the contradictory statements of interested witnessses and are deprived of the information which comes from actual observation of the lands and improvements.

(*b*) *The official allotments must be presumed to be regular.* The good faith of Rankin in making the allotments is not impeached. No fraud is shown. The allotments made by him are based on findings of fact as to priority and were approved by the Commissioner

of Indian Affairs and the Secretary of the Interior and patents issued. Every presumption of law is that these officers of the government performed their duty faithfully and uprightly, honestly and correctly.

Tecumseh Town Site case, 3 Nebr., 267, 284; *Lessee of Combs, et al., v. Lane*, 4 O. St., 112; *The State, ex rel. Wilson v. Mastin*, 103 Mo., 508; *Snow v. Weeks*, 75 Maine, 105, 107.

In *Insurance Co. v. Wright*, 60 Vt., 515, the court stated the rule thus:

> "That acts which purport to have been done by public officers in their official capacity, and within the scope of their duty, will be presumed to have been regular and in accordance with their authority."

Butler vs. Maples, 9 Wall., 766, is a case where an agent of the United States granted a permit to purchase cotton in the southern states during the war. A question arose as to whether the agent had exceeded his authority or misinterpreted the rules of the Treasury Department, in granting the permit. The court said: (p. 777.)

> "It may be that the grant of the permit was not technically a judicial act, but it was an exercise of the Treasury agent's judgment, and a deduction from the facts known by him, that the region over which the permit extended was within the military lines. It is to be presumed that he acted rightly, and as he could not lawfully grant the permit in the absence of such military occupation, his grant of it raised a presumption that the occupation existed. It establishes at least a *prima facie* case."

(c) *Without proof of fraud the allotments made are*

conclusive. In *Hegler v. Faulkler*, 153 U. S., 109, the court said, p. 115:

> "It is, indeed true that the President speaks and acts through the head of the several departments, in relation to subjects that pertain to their respective duties, and that the allotment of these lands by the Indian Department must be considered as made by the President in pursuance of the terms of the act of Congress and of the treaty. And it may be admitted that the decision of the special Indian agent, in identifying the Indian half-breeds entitled to participate, and in alloting the portion of each, would, in the absence of fraud, be conclusive. *Wilcox v. Jackson*, 13 Pet., 498, 511.

In the case at bar, the direct question was submitted to the Department, whether the present allottees and patentees were entitled to the lands alloted and patented to them, and ruled in their favor, and such action of the Department is final and conclusive, in the absence of fraud. It is also the law that the Interior Department in making the allotments and in determining priority of selection, acts judicially and its judgments like that of other special tribunals is impervious to collateral attack.

In *United States v. Winona, &c., R. R. Co.*, 32 U. S. App., 272, Sanborn, C. J., said, p. 283:

> "The Land Department of the United States, then, including in that term the Secretary of the Interior, the Commissioner of the General Land Office and their subordinate officers, constitutes a special tribunal under these and other provisions of the laws of the United States,

vested with the judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far complied with its conditions that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or preemption laws for a portion of the public domain that is subject to its disposition, that tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws, whether or not the land claimed was subject to preemption or to entry for a homestead, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land.

Similar questions must be heard and determined by that department whenever any portion of the public land subject to disposition by that tribunal is sold or otherwise disposed of in any way. In every case there must, in the nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land under the acts of Congress. A certificate or patent is the record evidence of the judgment of this tribunal, and

> it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department, it is, like the judgments of other special tribunals vested with judicial powers, impervious to collateral attack."

In *King v. McAndrew*, 111 Fed., 860, 864, Sanborn, C. J. said:

> "But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong."

Judge Sanborn in the last case *supra*, seems to have collated and cited all the authorities bearing upon these questions, and his opinion is a very learned and interesting study.

(*d*) *Fraud and collaterat attack.* We have remarked *supra* that there is no proof of fraud in the allotments made by Rankin. We have also remarked that his findings were upon questions of fact which are not reviewable. The abstract right of the complainants to have allotments, was a question of law *and fact* which had been adjudged against the complainants by the department prior to the allotment under the act of 1893. For the complainants in this proceeding to assail the prior judgments of the Interior Department wherein it was ruled and determined that the complainants were not entitled to allotments of land on the Omaha Reservation, would be *collateral*

attack upon said judgments which is not allowable. (See opinions of Sanborn *supra*.)

Even though this court should be of the opinion that Rankin had made a mistake of fact in the making of the allotments, yet, a simple mistake of fact would not justify a reinvestigation into priority of selection in this judicial proceeding. Independent of any mistake of fact on the part of Rankin, it appearing that the abstract right of the complainants to allotments having been long since adjudged and determined against them, they can have no standing in court in this proceeding, to assail the allotments made by Rankin and the patents which have been issued to the allottees.

XIV

The Complainants had no Preference Right to Select the Lands which They Claim, and Have Not Acquired any Vested Interest in the Lands by Reason of Their Pretended Selection.

The amendatory act of 1893 under which Allotting Agent Rankin allotted the lands which have been patented to the co-defendants, does not contain any provision vesting the Indian or claimants with the right of selection, nor with any right of priority of claim. Under that act the allotments are made by the Secretary of the Interior through an allotting agent of the Interior Department, and the individual Indians are not vested with any control over the allotments. The act of 1893 contains a clause, "that the allotments so made shall be subject to the same conditions, restrictions and limitations provided for in

sections 6, , 8," of the act of August 7, 1882. Six, seven, eight of the act of 1882 do not refer to the selection of the lands by Indians, but what is said upon that point is in section 5 of the act of 1882.

The complainants evidently base their claim upon a pretended selection for allotment under the act of 1882. But whatever selection they pretend to have made under the act of 1882 was not a selection made to an authorized agent of the Department, nor communicated to any authorized agent of the Interior Department, and was not made under and by virtue of a certificate of assignment issued under the provisions of the treaty of 1865, so as to fall within the terms of the provisions of section 5 of the act of 1882. Wherefore, the uncertain and unauthorized selection of lands by the complainants did not carry with it any right or interest in the lands in controversy.

Our point of contention is that the particular Indians have no vested interest in any particular lands on the Reservation so as to entitle them to maintain a suit in equity to compel the Government to allot them such particular lands.

These suits are brought on the theory that each plaintiff has such an ownership in the particular lands in their respective bills of complaint described as entitles them to have a decree that said particular lands shall be allotted to them to the exclusion of other Indians and that the Interior Department has no discretion in the selection of lands in making allotments.

We quote the prayer in one case, which may answer for all on this point:

> "Wherefore your orator shows unto your Honors that he is without adequate remedy at

law and remediless in the premises unless relieved by your Honors in this Court of Equity, and he therefore prays the aid of the Court in the premises, and that the said defendant may appear and answer this, your orator's bill, but without oath, answer under oath being expressly waived. That it be ordered and decreed that your orator is entitled to *have allotted him the lands described more particularly* in this, your orator's bill of complaint, and that the defendant, the United States of America, be ordered and required to make and issue to your orator the patent contemplated and provided by the foregoing treaties and acts of Congress and to recognize in all respects the rights of your orator to and upon the lands so now by him occupied, and that his rights thereto, under and by virtue of the said laws of the United States and treaties, be forever established, and that your orator may have such other and further relief as may be agreeable to equity and good conscience."

Thus it will be seen that the suits are not to establish the tribal relations of the plaintiffs, although that would be a substantive matter of defense in each case, and also an essential element of plaintiff's claim in each case, but the ultimate relief sought goes to the point of a vested interest in the respective lands claimed.

While it may be conceded that the Indians may make selections of land for allotment to them respectively, *such selection is not final* and gives them *no vested interest* until approved by the Secretary of the Interior.

In Sec. 6 of Act of 1882 (22 Stat., 342) it is provided:

"That upon the approval of the allotments provided for in the preceding section by the

Secretary of the Interior he shall cause patents to issue therefor, etc."

Irrespective of the positive provision of the statute *supra* it must necessarily be that the Secretary of the Interior is the final arbiter or tribunal in these matters of selection of lands for allotment, as several individual Indians might wish to select the same lands. It cannot be that where several different Indians select the same lands that each shall have a vested interest in the same lands, based on a mere act of selection.

A preference right to select. There is a provision in section 5 of the act of 1882 which gives an Indian who had lands assigned to him and a certificate issued under article 4 of the treaty of 1865 a "preference right to select" certain land:

> "PROVIDED, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article and who has made valuable improvements thereon, and any Indian, who, being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated for allotment under the provisions of this section.'

The "preference right to select" is confined to the following classes:

a Those to whom land has been assigned and certificate issued under treaty of 1865.

b Those who were entitled to receive such certificate and had made improvements on the land.

c Those who, being entitled to an assignment and

certificate, had settled upon and made valuable improvements upon a tract of land assigned to an Indian, who never occupied or improved such tract.

No one of the plaintiffs falls within either of these classes. They do not aver that the lands which they claim were assigned to them under the treaty of 1865, nor that they had received or were entitled to receive certificates under the treaty of 1865 for the particular lands they claim, nor that they had occupied and had made valuable improvements upon any tract of land which had been assigned to any other Indian under the treaty of 1865, and who had never occupied or improved said tract. It is conceded that no one of complainants holds a certificate of assignment under the treaty of 1865.

Article IV., treaty 1865 (14 Stat., 667), contains the following provisions:

> "There shall be assigned to each head of a family not exceeding one hundred and sixty acres. * * Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be made final and conclusive. *Certificate* shall be issued by the *Commissioner of Indian Affairs* for the tracts so assigned, specifying the names of the individuals to whom they have been assigned, respectively."

Taking the act of 1882 in conjunction with the treaty of 1865, *supra*, we will notice that even if the plaintiffs had received an assignment under the treaty of 1865, and had received a certificate of such assignment, they would not have a title to the lands in suit, but only a "*preference right to select*." But whereas the plaintiffs did not have, and do not claim to have, an

assignment and certificate for the lands in suit, under the treaty of 1865, they do not have even the "preference right to select," the specific lands in suit.

The "preference right to select" being out of this case on the record, any selection of lands for allotment by the plaintiffs would *not be superior to the selection of the same lands* by any other Indian of the tribe. If the right of selection by the plaintiffs is not a right superior under some provision of the law to the right of selection by other Indians of the same disputed lands, on what theory can the plaintiffs claim decrees in their favor? To maintain a suit for equitable relief the complainant must have a right superior to that of others.

XV

The Complainants do not Have a Vested Right in the Lands Which They Claim.

To Give the Court Jurisdiction to Decree that the Complainants are Entitled to a Particular Allotment of Land, They Must Show That They Have Acquired a Vested Right in the Said Lands.

My point of contention is that the mere occupancy of land with the intention of claiming it by way of allotment, or the mere marking of a tract of land as evidence of intent to select it for allotment, does not constitute such a vested right in the land as will entitle the party to have a decree in a court of equity giving him the particular land or divesting the patentee of the legal title to the same land. All the cases in which the court has sustained jurisdiction to grant equitable relief to the complainant, are cases where the com-

plainant had acquired a vested right to the land in controversy.

In *Johnson v. Towsley*, 13 Wall., 72, the local land office had decided in favor of Towsley, which decision was confirmed by the Commissioner of the general land office and patent issued to Towsley. Subsequently Johnson appealed to the Secretary of the Interior who decided in favor of Johnson, and a patent was issued to Johnson for the same lands.

Towsley filed his bill in equity claiming to have a vested right under the patent first issued to him from the general land office. The court said:

> "So also the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right and it can only be divested according to law."

Silver v. Ladd, 7 *Wall.*, 319, is a case where a certificate has been issued under the Oregon Donation Law by the Register and Receiver and set aside by the Commissioner, and it was said the certificate conferred a valid claim to the land and that the patent was issued by mistake to the wrong party.

In *Quinby v. Conlan*, 104 U. S., 420, the plaintiff had occupied the land and filed his declaratory statement in the form required by law, claiming the quarter sectoin as a pre-emption.

Vance v. Burbank, 101 U. S., 514, is a case where Scott settled on land and became a claimant. He notified the Surveyor General of his claim, which was duly entered. The same day he presented the Sur-

veyor General with the proof of his four years of residence and cultivation as required by law and demanded a certificate of proof of compliance with the law and a designation of the land. One Perkins claimed the said land.

Waite, C. J., said :

> "The question in dispute is one of fact, that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the donation act. This was to be determined by the Land Department and there was a contest, the contending parties were called on in the usual way to make their proofs. They appeared, and full opportunity was given Scott to be heard. He presented his evidence and was beaten, after having taken the case through by successive stages on appeal to the Secretary of the Interior. This, in the absence of fraud, is conclusive on all questions of fact."

We find in the books many other kindred cases. We have not found a case where the privileges of selection, as between rival claimants and the claim of one denied by the Department and the patent issued to the other, has been held to be sufficient foundation for an action in equity to obtain title to the land.

To the contrary, it was ruled in *Maddox v. Burnham*, 156 U. S., 544, that the mere occupation of public lands with the purpose at some subsequent time of entering it for a homestead, gave the party so occupying no rights.

Mr. Justice Brewer said:

> "This claim of the defendant cannot be sustained at the time of these transactions. The mere occupancy of land with the purpose of entering it for a homestead, gave to the party so entering no right."

In *Northern Pacific R. R. Co. v. Colburn*, 164 U. S., 383, it was ruled that no preemption or homestead claim attaches to a tract of public land until an entry in the local land office; and the ruling by the state court that occupation and cultivation by the claimant did create a right is overruled. For other rulings holding that the mere fact of occupancy and cultivation does not create a right in the occupation under the homestead and preemption laws, see the following cases.

Kansas Pacific Railroad v. Dunmeyer, 113 U. S., 629, 644; *Hastings & Dakota Railroad v. Whitney*, 132 U. S., 357; *Whitney v. Taylor*, 158 U. S., 85; *Lansdale v. Daniels*, 100 U. S., 113, 116.

Frank Peters states that in the year 1881 he went temporarily upon the Reservation, put a red stake upon certain lands as an evidence of selection and then returned to the Nemaha Reservation, and that his grandfather at the same time made a similar selection and that they had some conversation with the Indian Agent at said time about said selection. But this cannot avail for two reasons: (1) It was before the act of 1882 was passed providing for allotments. (2) The Indian Agent was not an alloting agent and had no authority in the premises.

It is ruled in *Maddox v. Burnham*, 156 U. S., 544-47, that unauthorized permission by land officer to occupy gives no rights.

XVI

These Actions Cannot be Maintained by Heirs of Deceased Parties.

A Selection of Lands for Allotment Does not Create an Interest on the Land That Will Descend to Heirs.

In Doc. T. No. 174, the suit is prosecuted by John M. Sloan, Artemesia Frost, and Thomas L. Sloan as the heirs at law of Margaret Sloan. In Doc. T. No. 164, the suit is in the name of Mitchell Monette, David Monette, Jennie M. Arnold, and Cassie M. Karch as heirs at law of Mary Monnette. Grant if you please that Margaret Sloan and Mary Monette had made a selection of lands with the view of obtaining an allotment, nevertheless, such selection would not create an inchoate interest in the lands that would descend to their heirs. It is shown by cases cited, *supra*, that the mere occupancy and cultivation of lands does not create a right to or interest in the lands.

At most the occupancy of the land could give nothing more than a preferential right of selection for allotment, but under the law the allotments are made by the Secretary of the Interior acting through the agents of that Department. Certainly the occupant could not acquire an interest in the land which would descend to heirs, until such occupancy and selection had received a recognition by the allotting department of the Government.

Section 6, of the act of 1882 provides that the Secretary of the Interior shall cause "patents to issue therefor in the name of the *allottees*." There is no provision for the issuing of patents to the *heirs* of

allottees, and there is no provision for the making of allotments to the heirs of deceased persons.

This question seems to be settled by the last clause of Section 6 of the act of 1882: "Provided that the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered."

The above clause seems to preclude the idea of the laws of descent applying to allotments prior to the issuing of the patents to allottees.

Jno. L. Webster

Solicitor for Defendants.

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APPENDIX.

COPIES OF TREATIES AND ACTS OF CONGRESS RELATING TO OMAHA TRIBE OF INDIANS, AND ACT UNDER WHICH THE SUITS ARE BROUGHT.

(7 U. S. St. at Large, p. 328.) TREATY OF 1830.

ARTICLES OF A TREATY.

MADE AND CONCLUDED BY WILLIAM CLARK, SUPERINTENDENT OF INDIAN AFFAIRS, AND WILLOUGHBY MORGAN, COLONEL OF THE UNITED STATES FIRST REGIMENT OF INFANTRY, COMMISSIONERS ON BEHALF OF THE UNITED STATES, ON THE ONE PART, AND THE UNDERSIGNED DEPUTATIONS OF THE CONFEDERATED TRIBES OF THE SAXS AND FOXES; THE MEDAWAH-KANTON, WAHPACOOTA, WAHPETON AND SISSETON BANDS OR TRIBES OF SIOUX; THE OMAHAS, IOWAYS, OTTOES AND MISSOURIAS ON THE OTHER PART.

The said tribes, being anxious to remove all causes which may hereafter create any unfriendly feeling between them, and being also anxious to provide other sources for supplying their wants besides those of hunting, which they are sensible must soon entirely fail them,

agree with the United States on the following articles:

ARTICLE I. The said tribes cede and relinquish to the United States forever all their right and title to the lands lying within the following boundaries, to-wit: Beginning at the upper fork of the Des Moines River, and passing the sources of the Little Sioux and Floyds Rivers to the fork of the first creek which falls into the Big Sioux or Calumet on the east side; thence down said creek and Calumet River to the Missouri River; thence down said Missouri River to the Missouri State line, above the Kansas; thence along said line to the northwest corner of the said State; thence to the highlands between the waters falling into the Missouri and Des Moines, passing to said highlands along the dividing ridge between the forks of the Grand River; thence along said highlands or ridge separating the waters of the Missouri from those of the Des Moines, to a point opposite the source of Boyer River, and thence in a direct line to the upper fork of the Des Moines, the place of beginning. But it is understood that the lands ceded and relinquished by this treaty are to be assigned and allotted under the direction of the president of the United States, to the tribes now living thereon, or to such other tribes as the president may locate thereon for hunting and other purposes.

ARTICLE II. The confederated tribes of the Sacs and Foxes cede and relinquish to the United States forever a tract of country twenty miles in width, from the Mississippi to the Des Moines, situate south, and adjoining the line

between the said confederated tribes of Sacs and Foxes and the Sioux; as established by the second article of the treaty of Prairie du Chien of the nineteenth of August, One Thousand Eight Hundred and Twenty-five.

ARTICLE III. The Medawah-Kanton, Wahpacoota, Wahpeton and Sisseton bands of the Sioux cede and relinquish to the United States forever, a tract of country twenty miles in width, from the Mississippi to the Des Moines River, situate north, and adjoining the line mentioned in the preceding article.

ARTICLE IV. In consideration of the cessions and relinquishments made in the first, second and third article of this treaty, the United States agree to pay to the Sacs three thousand dollars—and to the Foxes three thousand dollars; to the Sioux of the Mississippi two thousand dollars; to the Yancton and Santie bands of Sioux three thousand dollars; to the Omahas two thousand five hundred dollars; to the Ioways two thousand five hundred dollars; to the Otoes and Missourians two thousand five hundred dollars, and to the Sacs of the Missouri River five hundred dollars; to be paid annually for ten successive years at such place or places on the Mississippi or Missouri, as may be most convenient to said tribe, either in money, merchandise or domestic animals, at their option; and when said annuities or any portion of them shall be paid in merchandise, the same is to be delivered to them at the first cost of the goods at St. Louis, free of transportation. And the United States further agree to make to the said tribes and bands, the following allowances for the period of ten

years, and as long thereafter as the president of the United States may think necessary and proper, in addition to the sums hereinbefore stipulated to be paid them; that is to say; To the Bands of the Sioux mentioned in the third article, one blacksmith at the expense of the United States, and the necessary tools; also instruments for agricultural purposes, and iron and steel to the amount of seven hundred dollars; To the Yancton and Santie Bands of Sioux, one blacksmith at the expense of the United States, and the necessary tools, also instruments for agricultural purposes to the amount of four hundred dollars; To the Omahas, one blacksmith at the expense of the United States and the necessary tools, also instruments for agricultural purposes to the amount of five hundred dollars; To the Ioways an assistant blacksmith at the expense of the United States. also instruments for agricultural purposes to the amount of six hundred dollars; To the Ottoes and Missourias one blacksmith at the expense of the United States, and the necessary tools, also instruments for agricultural purposes to the amount of five hundred dollars; and to the Sacs of the Missouri River, one blacksmith at the expense of the United States and the necessary tools, also instruments for agricultural purposes to the amount of two hundred dollars.

ARTICLE V. And the United States further agree to set apart three thousand dollars annually for ten successive years, to be applied in the discretion of the President of the United

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States, to the education of the children of the said Tribes and Bands, parties hereto.

ARTICLE VI. The Yancton and Santie Bands of the Sioux not being fully represented, it is agreed, that if they shall sign this Treaty, they shall be considered as parties thereto, and bound by all stipulations.

ARTICLE VII. It is agreed between the parties hereto, that the lines shall be run, and marked as soon as the President of the United States may deem it expedient.

ARTICLE VIII. The United States agree to distribute between the several Tribes, parties hereto, five thousand one hundred and thirty-two dollars worth of merchandise, the receipt whereof, the said Tribes hereby acknowledge; which together with the amounts agreed to be paid, and the allowances in the fourth and fifth articles of this Treaty, shall be considered as a full compensation for the cession and relinquishments herein made.

ARTICLE IX. The Sioux Bands in Council having earnestly solicited that they might have permission to bestow upon the half-breeds of their Nation, the tract of land within the following limits, to-wit; Beginning at a place called the barn, below and near the village of the Red Wing Chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi, about thirty-two miles to a point opposite Beef or O-Boeuf River: thence fifteen miles to the Grand Encampment opposite the river aforesaid; the United States agree to suffer said half-breeds to occupy said tract of country; they holding by the same

title and in the same manner that other Indian titles are held.

ARTICLE X. The Omahas, Ioways and Ottoes for themselves and in behalf of the Yancton and the Santie bands of Sioux, having earnestly requested that they might be permitted to make some provisions for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to-wit: Beginning at the mouth of the Little Ne-mohaw River, and running upthe main channel of said river to a point which will be ten miles from its mouth in a direct line; from thence in a direct line, to strike the Grand Ne-mohaw ten miles above its mouth, in a direct line (the distance between the two Ne-mohaws being about twenty miles); thence down said river to its mouth; thence up, and with the meanders of the Missouri River to the point of beginning it is agreed that the half-breeds of said tribes and bands may be suffered to occupy said tract of land; holding it in the same manner, and by the same title that other Indian titles are held; but the President of the United States may hereafter assign to any of the said half-beeeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding article.

ARTICLE XI. The reservation of land mentioned in the preceding article having belonged to the Ottoes, and having been exclusively ceded by them; it is agreed that the Omahas,

the Ioways and the Yancton and Santie bands of Sioux shall pay out of their annuities to the said Ottoe tribe, for the period of ten years, three hundred dollars annually; of which sum the Omahas shall pay one hundred dollars, the Ioways one hundred dollars, and the Yancton and Santie bands one hundred dollars.

ARTICLE XII. It is agreed that nothing contained in the foregoing articles shall be so construed as to affect any claim, or right in common, which has heretofore been held by any tribes, parties to this treaty, to any lands not embraced in the cession herein made; but that the same shall be occupied and held by them as heretofore.

ARTICLE XIII. This treaty, or any part thereof, shall take effect and be obligatory upon the contracting parties, so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

Done and Signed and sealed at Prairie du Chien, in the Territory of Michigan, this fifteenth day of July, in the year of our Lord One Thousand Eight Hundred and Thirty, and of the Independence of the United States, the fifty-fifth.

WILLIAM CLARK,
Su. In. Affairs,
WILLOUGHBY MORGAN,
Col. 1st. Inft., U. S. A.,
(Commissioners).

(Indian signatures omitted).

Act of July 31, 1854. (10 U. S. Stat., 332).

Sec. 5 (4). And be it further enacted, That the President be, and he is hereby authorized

and required to cause to be fulfilled the stipulations of the ninth and tenth articles of the treaty with the Sacs and Foxes, and other tribes of Indians, concluded on the fifteenth of July, one thousand eight hundred and thirty, by causing said reserved tracts to be surveyed and allotted to the persons properly entitled to the same, in fee simple, in such manner and under such rules and regulations as he may prescribe; and to defray the expenses of the same, there be and is hereby, appropriated the sum of ten thousand nine hundred and twenty-two dollars and twenty-nine cents.

TREATY WITH THE OMAHA INDIANS, March 6, 1865.

U. S. Statutes at Large, Vol. 14, p. 667.

ARTICLE I. The Omaha tribe of Indians do hereby cede, sell and convey to the United States a tract of land from the north side of the present reservation, defined and bounded as follows, viz: Commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles thence south four miles, thence west to the western boundary line of the reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the river to the place of the beginning; and that the said Omaha tribe of Indians will vacate and give possession of the lands ceded by this treaty immediately after its ratification. *Provided*, That nothing herein shall be construed to include any of the lands upon which the said Omaha tribe of In-

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dians have now improvements, or any land or improvements belonging to, connected with, or used for the benefit of the Mission school now in existence upon the Omaha reservation.

ARTICLE II. In consideration of the foregoing cession, the United States agrees to pay to this said Omaha tribe of Indians the sum of fifty thousand dollars, to be paid upon the ratification of this treaty, and to be expended by their agent, under the direction of the Commissioner of Indian Affairs, for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation.

ARTICLE III. In further consideration of the foregoing cession, the United States agree to extend the provisions of article VIII. of the treaty between the Omaha tribe of Indians and the United States, made on the 16th day of March, A. D. 1854, for a term of ten years from and after the ratification of this treaty; and the United States further agree to pay to the said Omaha tribe of Indians, upon the ratification of this treaty, the sum of seven thousand dollars as damages in consequence of the occupancy of a portion of the Omaha reservation not hereby ceded, and use and destruction of timber by the Winnebago tribe of Indians while temporarily residing thereon.

ARTICLE IV. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe including their half or mixed

blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well defined exterior boundary. The whole of the lands, assigned and unassigned, in severalty, shall constitute and be known as the Omaha Reservation, within and over which all laws passed, or which may be passed, by Congress, regulating trade and intercourse with the Indian tribes, shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the Superintendent of Indian Affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when ap-

proved by him shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs and descendants; and said tracts shall not be alienated in fee, leased or otherwise disposed of, except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale or forfeiture, unless otherwise provided for by Congress.

ARTICLE V. It being understood that the object of the government in purchasing the land herein described is for the purpose of locating the Winnebago tribe thereon; now, therefore, should their location there prove detrimental to the peace, quiet and harmony of the whites as well as of the two tribes of Indians, then the Omahas shall have the privlege of repurchasing the land herein ceded upon the same terms as they now sell.

In testimony whereof, the said Clark W. Thompson and Robert W. Furnas, Commissioners aforesaid, and the said chiefs and delegates of the Omaha tribe of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

CLARK W. THOMPSON,
R. W. FURNAS,
Commissioners.

(Indian signatures omitted.)

Act of Aug. 7, 1882. (22 U. S. Stats., 341.)

CHAPTER 434.—An act to provide for the

sale of a part of the Reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is authorized to cause to be surveyed, if necessary, and sold, all that portion of their Reservation in the State of Nebraska lying west of the right of-way granted by said Indians to the Sioux City & Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seven, eighteen hundred and eighty. The said lands shall be appraised in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

Sec. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each *bona fide* settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to

purchase, for each, through the United States public landoffice at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act: *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made; *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability to survey to make township and section lines conform to the boundary lines of the Reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases; *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre; *And provided further*, That all land in township twenty-four, range seven east, remaining unallotted on the first of June, eighteen hundred and eighty-five, shall be appraised

and sold as other lands under the provisions of this act.

Sec. 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the treasury of the United States, and shall bear interest at the rate of 5 per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

Sec. 4. That when purchasers of said lands have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption act: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

Sec. 5. That with the consent of said Indians as aforesaid, the Secretary of the Interior be and he is hereby authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April 19th, 1880, approved by the Acting Secretary of the Interior, July 27th, 1880, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section, to each single person over eighteen

years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided; *Provided*, That any Indian to whom a tract of land has been assigned, and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, has settled and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section; *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the al-

lotments provided for in the preceeding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heir as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered.

Sec. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said state shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

Sec. 8. That the residue of lands lying east of the said right of way of the Sioux

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City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, it shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for a period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians, or any part of them may, if they shall so elect, select the land which shall be allotted to them in sever-

alty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

Sec. 9. That the Commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

Sec. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved August 7, 1882.

Amendatory Act of 1893.

The Indian Appropriation Act, approved March 3, 1893, contains the following provision relative to these Indians.

"That the act of Congress, approved August seventh, eighteen hundred and eighty-two, entitled 'An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes,' be and the same is hereby amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions

of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section as therein provided, and to allot in severalty to each allottee under said act, now living, who received only, one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands: Provided, That the allotments so made shall be subject to the same conditions, restrictions and limitations provided for in sections six, seven and eight of said act touching allotments and patents to allottees therein mentioned: And provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations."

Act Conferring Jurisdiction upon the Courts in Allotment Cases.

"An act amending the act of August fifteenth, eighteen hundred and ninety-four, entitled 'An act making appropriations for current and contingent expenses of the Indian Department, and fulfilling treaties and stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-five,' and for other purposes:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That that portion of the act of August fifteenth, eighteen hundred and ninety-four found on page three hundred and five of Twenty-eighth Statutes at Large, be amended so as to read as follows:

"That all persons who are in whole or in

part of Indian blood or decent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment of any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant; and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

"SEC. 2. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is

brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit; and within sixty days after the service of petition upon him, unless the time should be extended by order of the court, make in the case to file a plea, answer or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer or defense as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof unless he shall establish the same by proof satisfactory to the court."

Approved February 6, 1901 (31 U. S., Statutes, 760).